

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND

RECORDED BOOKS, LLC

Plaintiff/Counter  
Defendant,

v.

OCLC ONLINE COMPUTER LIBRARY  
CENTER, INC. d/b/a NETLIBRARY,

Defendant/Counter  
Plaintiff.

Case No. 07 CV 1427 (DKC)

**DECLARATION OF SCOTT WASINGER IN OPPOSITION  
TO PLAINTIFF RECORDED BOOK LLC'S MOTION FOR PRELIMINARY INJUNCTION**

I, Scott Wasinger, hereby declare and state:

1. I am employed by NetLibrary as Managing Director of Business Development and have been with the company and have served in that capacity for approximately eighteen months.

2. As Director of Business Development, among other things, I am responsible for maintaining and growing the e-audiobook portion of NetLibrary's business.

**I. Relevant Background**

3. NetLibrary is a division of OCLC Online Computer Library Center, Inc. ("OCLC"). OCLC is a non-profit company, exempt from taxation under 26 U.S.C. § 501(c), whose mission is to help libraries throughout the world improve their services and provide affordable access to information. For over 50 years, OCLC has helped over 57,000 libraries expand their services and provide affordable access to information.

4. NetLibrary is OCLC's "eContent" division. *Id.* Among other things,<sup>1</sup> NetLibrary creates specialized, proprietary platforms to distribute electronic audiobooks ("e-audiobooks") to libraries and their patrons. Audiobooks are recordings of books read aloud. *Id.* e-audiobooks are digital file versions of audiobooks that are available for download over the Internet to computers and other listening devices.

5. While NetLibrary makes it possible for library patrons to search, access and download an e-audiobook, it is not a publisher or holder of copyrights. Rather, NetLibrary depends on audiobook publishers, such as Recorded Books, for content. NetLibrary converts audiobooks into e-audiobooks by making digital copies of audiobooks. NetLibrary also "hosts" e-audiobooks by making them searchable and downloadable through the Internet.

6. From 2004, through the end of 2006, almost 100% of NetLibrary's content was provided by Recorded Books. Recorded Books' content also accounted for between 30% and 40% of all of NetLibrary's revenue. By the end of May 2007, Recorded Books' audiobooks accounted for approximately 46% of NetLibrary's e-audiobook content.

## **II. NetLibrary's Agreement with Recorded Books.**

7. NetLibrary entered into the eContent Production and Distribution Agreement ("Agreement") on September 10, 2004. A true and correct copy of the Agreement is attached hereto as Exhibit 1.

8. Under the Agreement, NetLibrary converts audiobooks into e-audiobooks and then "hosts" them for libraries on NetLibrary's proprietary platform. Both NetLibrary and Recorded Books market and sell Subscriptions to Bundled Collections of e-audiobooks. NetLibrary and Recorded Books

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<sup>1</sup> NetLibrary also distributes "ebooks," which are downloadable text-based electronic books – they are not based on sound recordings.

both agreed to sell Recorded Books' content in pre-selected, combined collections (the "Bundled Collections"), to sell Recorded Books' collections through subscription agreements, and only to sell these Bundled Collections to military bases, libraries, or related entities. Libraries cannot buy individual titles from NetLibrary under the Agreement. Rather, libraries pay solely for the ability to allow their patrons to check out titles from the Bundled Collection for the duration of the Subscription.

9. The Agreement with Recorded Books is not an exclusive one and NetLibrary is free to sell the content of other audiobook publishers. Indeed, an exclusive arrangement with Recorded Books would be contrary to NetLibrary's non-profit status and NetLibrary is prohibited from agreeing to such exclusivity provisions. Attached hereto as Exhibit 2 is a true and correct copy of an email between NetLibrary and Recorded Books, which was sent, kept and received in the course of ordinary business, and which reflects NetLibrary's understanding that the Agreement would not be exclusive.

10. Revenues generated under the parties' Agreement exceeded \$5,000,000.00 in the second year of the Agreement (2005 – 2006) and, at the time Recorded Books filed the current lawsuit, revenues had exceed \$3,000,000.00 and were on track to exceed \$5,000,000.00.

### **III. The Subscription Sales Model**

11. NetLibrary can only distribute Recorded Books' content through "Bundled Collections," and can only distribute Bundled Collections by "Subscription sales agreements." *See* Exhibit 1 (at Exhibit C, § 1.(a), thereto). Bundled Collections include the 800-title "Core Collection," with its mixed variety of award-winning popular titles, the 200-title "Essentials Collection," with literary classics, the 250-title "Children's and Young Adult Collection." Under the Subscription sales model, libraries pay anywhere from \$2,500 to \$50,000 per year for unlimited simultaneous access to each Bundled Collection up to a cap of 3,500 to 100,000 "check-outs" that depends on the Bundled Collection being



purchased and the size of the library making the purchase. But, libraries that buy subscriptions do not have any ability to select specific titles for inclusion in their Bundled Collection or to purchase licenses for continued use after their subscriptions expire. The subscription model also does not allow libraries to purchase a subscription or to retain any residual interest in any e-audiobook title once a subscription has expired. NetLibrary has not allowed any content provider, other than Recorded Books, to contribute content or to participate in the parties' subscription agreement, nor has NetLibrary entered into any other kind of subscription arrangement with any other provider or publisher.

#### **IV. The "For Purchase" Model**

12. In early 2007, two years after establishing the Subscription sales model for Recorded Books, NetLibrary began to sell single titles of other e-audiobooks to libraries under "for purchase" agreements. This for-purchase model allows libraries to purchase (and own) individual or multiple e-audiobooks to use on the NetLibrary host platform. Libraries can purchase individual or multiple titles, but must do so on a one-user-per-license basis. Unlike the Subscription model, libraries that participate in the for-purchase program do not receive access to pre-selected bundled collections of titles, are not able to provide unlimited access to titles, are not restricted to a maximum number of check-outs, and do not need to pay a subscription fee to continue access to e-audiobooks every year. In short, libraries that purchase e-audiobooks do not subscribe to a collection of books. Rather, each library owns the rights to the e-audiobooks they purchase.

13. For example, NetLibrary sold the Saint Paul Public Library 107 e-audiobooks under the "for purchase" program in two separate sales (one in April 2007 and one in June 2007). The total value of these sales was \$5,861.57 (or, \$54.78 per title, on average). Instead of a Subscription for unlimited, simultaneous access to the Core Collection of over 800 e-audiobooks (which would cost \$25,000.00),



the Saint Paul Public Library purchased a permanent license for 107 e-audiobooks for \$5,861.57. A true and correct copy of the purchase agreement signed by the Saint Paul Public Library is attached hereto as Exhibit 3.

14. NetLibrary also sells e-audiobooks under the “for purchase” model to nonprofit library consortia like the Bibliographical Center for Research (“BCR”) and the Southeastern Library Network (“SOLINET”). These consortia are groups of libraries that join together for communal purchasing. A “for purchase” transaction by a consortium is no different than a “for purchase” transaction with a library; the consortium purchases a license(s) for individual e-audiobooks just like a library does. The consortium’s members, however, have agreed to share and exchange their purchased titles with one another. The purpose of group buying is to give patrons of participating libraries access to more e-audiobooks than their libraries could otherwise afford. NetLibrary’s agreements with BCR and SOLINET are both Purchase Agreements for the ownership of licenses for certain e-audiobook titles. Like any other purchase agreement, the libraries within BCR’s and SOLINET’s network do not subscribe to collections of books. Rather, each member library owns the rights to the e-audiobooks that it purchases. NetLibrary does not sell “subscription” services to consortia libraries. True and correct copies of the BCR and SOLINET consortium agreements are attached hereto as Exhibits 4 and 5, respectively. Some third parties have incorrectly referred to the “shared collections” of purchased e-audiobooks by these consortia as “subscriptions.” At least one publisher contributing content to the shared collections has protested and insisted that NetLibrary and all other third parties drop any reference to “subscriptions.” After a conference call and a meeting with this publisher, the publisher agreed that NetLibrary could continue to market, sell and distribute its content under a “shared

collection,” but only if NetLibrary made efforts to distinguish “shared collections” sales from subscriptions sales and only if NetLibrary’s third-party partners do so as well.

#### **IV. Recorded Books’ Attempt to Terminate the Agreement**

15. On April 20, 2007, Recorded Books’ attorney sent a letter to NetLibrary claiming to terminate the Agreement. The letter stated that Recorded Books was entitled to immediately terminate the Agreement pursuant to both Section 4(b)(ii) of the Agreement (“material breach” of Exhibit B) and Section 1(a) of Exhibit C. A true and correct copy of Recorded Books’ purported termination letter is attached hereto as Exhibit 6.

16. The April 20, 2007, letter did not identify or purport to provide a 60-day notice of termination and right to cure. At most, the letter identified minor technical issues and purported to repeat vague complaints from fifteen libraries, out of the over 1,700 libraries served under the Agreement. The letter did confirm Recorded Books’ obligation to continue to deliver new audiobook titles to NetLibrary for those NetLibrary subscriptions currently in effect.

#### **IV. The Harmful Effects of Recorded Books’ Requested Injunction**

17. Under the parties’ Agreement, NetLibrary agreed to create a production and distribution platform for Recorded Books’ content. In exchange, NetLibrary received a long-term commitment and a significant (three-year) phase-out period after termination so that it could transition its libraries, as well as relocate its employees, develop new products, and refocus its sales team. Unlike with Recorded Books’ established and diversified business, an immediate termination would remove one of NetLibrary’s largest product lines, nearly all of its e-audiobook business, and between 30-40% of its total revenue.

18. Moreover, Recorded Books has not claimed to have an alternate delivery system that it could use to provide continued subscription services to the over 1,700 libraries that have paid for e-audiobook subscriptions. Permitting Recorded Books to unilaterally and immediately terminate the Agreement without a clear plan in place for whether and how Recorded Books is to offer digital, downloadable e-audiobooks in the future is, in my opinion, not in those libraries' best interests. One of the reasons that the parties negotiated a three-year "phase-out" period in the Agreement in the event of termination by Recorded Books was to give libraries that had bought e-audiobook subscriptions the ability to transition from NetLibrary to Recorded Books (or any alternate service provider selected by Recorded Books) at the library's convenience rather than at the convenience of Recorded Books or NetLibrary.

19. As of July 2007, there were approximately 1,600 libraries with current e-audiobook Subscriptions. The longest of these Subscriptions runs through July 2009.

## **V. Complaints**

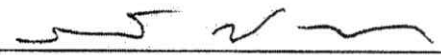
20. NetLibrary and Recorded Books have sold over 1,700 subscriptions to libraries pursuant to the Agreement. Each subscribing library requires a substantial amount of technical work and attention on the part of NetLibrary to make sure that their subscription service runs smoothly.

21. I have reviewed the Memorandum filed in support of Plaintiff Recorded Books' Motion for Preliminary Injunction. That Memorandum mentions complaints by a total of fifteen libraries out of 1,700. Given the significant amount of technical and customer service work required to make each library's subscription program a success, I consider fifteen complaints out of a possible 1,700 to be more than a commercially reasonable level of customer satisfaction. If NetLibrary's success under the



subscription program were to be measured according to the number of complaints, the subscription program is an unqualified success.

I declare under penalty of perjury that the foregoing is true and correct. Executed on July 6, 2007.

  
\_\_\_\_\_  
Scott Wasinger

# **EXHIBIT 1**

This document is a draft and is subject to change until it is fully executed.

## ECONTENT PRODUCTION AND DISTRIBUTION AGREEMENT

ORIGINAL

THIS ECONTENT PRODUCTION AND DISTRIBUTION AGREEMENT (this "Agreement") is between netLibrary, a division of OCLC Online Computer Library Center, Inc., an Ohio nonprofit corporation, whose primary business address is 4888 Pearl East Circle, Suite 103, Boulder, CO 80301 U.S.A. ("netLibrary"), and Recorded Books LLC, a Delaware limited liability company whose primary business address is 270 Skipjack Road, Prince Frederick, MD 20678 ("Recorded Books").

Recorded Books has proprietary rights to various types of content (defined below as "Publisher Products") which may include, but are not limited to audiobooks. netLibrary has proprietary rights to a system (defined below as "the NL System") for the distribution of eContent, including audiobooks. The parties desire to use the NL System to market, sell, and distribute to Recipient(s) Subscriptions to Bundled Collections of NL Electronic Versions of the Publisher Products on the terms set out below.

ECONTENT PRODUCTION AND DISTRIBUTION AGREEMENT .....	1
1. Purpose of Agreement and Exhibits .....	2
2. Definitions .....	2
3. Distribution Rights .....	3
4. Term and Termination .....	4
5. Representations and Warranties .....	5
6. Warranty Disclaimer .....	5
7. Indemnification .....	5
8. Limitation on Damages .....	6
9. Intellectual Property Rights .....	6
10. Confidential Information .....	6
11. General Provisions .....	8
Exhibit A – Production of NL Electronic Versions of Publisher Products .....	10
1. Delivery of Publisher Products .....	10
2. File Assessment .....	10
3. Production .....	10
4. Production Charges, Invoicing, and Payment .....	11
5. Archive .....	12
Schedule A-1 - Production Charges .....	13
1. Production Charges .....	13
2. Audio Book File Submittal .....	13
3. Cataloging Audio Book(s) .....	13
Exhibit B - Hosting Services .....	14
1. netLibrary Services .....	14
2. Recorded Books Obligations .....	15
Schedule B-1 – Technical Specification .....	16
1. Definitions .....	16
2. Audio Books Collection and Access Model .....	16
3. Interface .....	16
4. NL System .....	17
5. Network and Infrastructure .....	18
6. Order Processing, Submittal, Fulfillment, and Customer Support .....	18
Exhibit C – Audio Book Commercial Terms .....	20
1. Special Terms Applicable to Audio Books .....	20
2. Subscription Pricing and Payments .....	20
3. Promotions .....	26
4. Title Commitment .....	26
Exhibit D – Library Audio Book Agreement .....	27

*AB*



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## 1. Purpose of Agreement and Exhibits.

- (a) This Agreement authorizes Recorded Books and netLibrary to market, sell, and distribute Bundled Collections of NL Electronic Versions of Publisher Products.
- (b) Exhibit A authorizes netLibrary to perform the actions necessary to create electronic versions of the Publisher Products in the form distributed by netLibrary (defined above as "NL Electronic Versions").
- (c) Exhibit B describes the steps netLibrary will take to use the NL System to host and provide access to Bundled Collections of NL Electronic Versions of Publisher Products.
- (d) Exhibit C describes the business terms upon which Recorded Books and netLibrary have agreed to market, sell, and distribute Bundled Collections of NL Electronic Versions of Publisher Products.

## 2. Definitions

### (a) Definitions. As used in this Agreement:

- (i) "Annual Revenues" means the combined gross sales of Subscriptions by both Recorded Books and netLibrary during a 12 month period following the Effective Date of the Agreement or, in the case of Renewals, a 12 month period following the applicable anniversary of the Effective Date of the Agreement.
- (ii) an "Audio Book File" means a digital electronic version of the Publisher Product that meets netLibrary's file format specifications for Audio Book Files. Acceptable Audio Book File input formats include MP3, WMA, WAV, CD, or DVD.
- (iii) "Bundled Collection(s)" means a combined collection of NL Electronic Versions of Publisher Products that netLibrary and Recorded Books have agreed in writing to group together for sale as a Subscription.
- (iv) "Customer Support" means the support provided by netLibrary to Recipients in response to Tier 1 and Tier 2 Customer Support Queries and/or technical problems. Tier 1 Support Queries are routine and basic inquiries, and include FAQs, order inquiries, billing inquiries, payment inquiries, credit inquiries, and related inquiries of a similar scope. Tier 2 Support Queries are service effecting inquiries, and include interruptions in service, system failure, and related inquiries of a similar magnitude.
- (v) "Effective Date" means September 10, 2004.
- (vi) a "NL Electronic Version" means each Publisher Product that is compatible with the NL System, including the applicable Media reader.
- (vii) the "NL System" means the certain online website, computer equipment, software programs, database systems, the applicable Media reader, and related technical processes, know-how, and documentation that netLibrary uses to offer Products and Services.
- (viii) "Production" means the process by which a Publisher Product is transformed into a 'NL Electronic Version.'
- (ix) "Publisher Products" means specific content controlled by Recorded Books that are jointly selected by Recorded Books and netLibrary for distribution under this Agreement. Publisher Products may include, but are not limited to audiobooks or other types of electronic content as mutually agreed upon by the parties.
- (x) a "Recipient" means a public, school, or university library; military base; or any library associated with these institutions. If netLibrary or Recorded Books wants to sell a Subscription to some other organization, then it must obtain written consent to the sale from an authorized representative of the other party.
- (xi) "Revenues" means the combined gross sales of Subscriptions by both Recorded Books and netLibrary.

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- (xii) "Hosted Services" means the non-exclusive services performed by netLibrary in accordance with the terms of this Exhibit, and as described further in Exhibit B and Schedule B-1.
- (xiii) A "Subscription" means an annual license for access to a Bundled Collection on the basis described in Exhibit C. Section 2.(a).
- (xiv) "Subscription Price" means the price that netLibrary and Recorded Books mutually agree to charge a Recipient for each sale of a Subscription
- (xv) "Technical Specification" means the document attached hereto as Schedule B-1 to Exhibit B and incorporated by reference.
- (xvi) a "Third-Party File" means a digital electronic version of the Publisher Product in a file format created by Recorded Books or a third party that is not consistent with the applicable netLibrary file format specification.
- (b) During the initial phase of this project, Recorded Books has informed netLibrary that Recorded Books will be delivering Publisher Products to netLibrary on Audio CD(s). As the parties work together to define file format specifications for receiving Audio Books on Audio CD(s), MP3 files, WAV files, WMA files; netLibrary will prepare and provide electronic copies of the file format specifications to Recorded Books. netLibrary will also post the file format specifications and other information on Production; including a metadata submission form; at: <http://www.netlibrary.com/extranet/RecordedBooks/specifications/>.

### 3. Distribution Rights.

- (a) Grant of Rights. Recorded Books grants netLibrary the worldwide, nonexclusive right and license to:
  - (i) market, distribute, and sell to Recipients Subscriptions to Bundled Collection(s) of NL Electronic Versions that may be accessed by transmission or communication using the Internet;
  - (ii) produce, convert, or integrate all or parts of the NL Electronic Version from the corresponding Publisher Product, to the extent required to exercise netLibrary's rights under this Agreement;
  - (iii) load, store, use, copy, and reproduce the NL Electronic Versions for distribution and display to Recipients in a mutually agreed upon format (e.g. audiobook, etc.), compatible with the NL System, including any media reader software that netLibrary adopts; and
  - (iv) grant rights to Recipient(s) to download the NL Electronic Versions for temporary use.
- (b) Reservation of Rights. Nothing in Section 3(a) will limit or impair Recorded Books' right to market and sell Subscriptions to Bundled Collections to Recipients in accordance with the terms of this Agreement.
- (c) Digital Rights Management and Security.
  - (i) If netLibrary will host NL Electronic Versions of Publisher Products on the NL System; then, as provided in this Section 3(b)(i), during the term of this Agreement, netLibrary will use commercially reasonable efforts:
    - (1) to maintain a secure hosting environment for the NL Electronic Versions;
    - (2) to protect the NL Electronic Versions from copyright infringement or other unauthorized use according to netLibrary's regular digital rights management practices;
    - (3) to ensure that any Recipient that purchases NL Electronic Versions or services or both will comply with the applicable version of netLibrary's form Electronic Content Agreement ("Recipient Agreement"); and
    - (4) to perform the other Digital Rights Management Activities specified in Section 4.(b) of Schedule B-1 to Exhibit B.
  - (ii) A library or other Recipient that wants to purchase NL Electronic Versions of the Publisher Products or netLibrary's services or both must sign an Electronic Content Agreement



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(substantially in the form attached hereto as Exhibit D, and also available at <http://www.netlibrary.com/extranet/publisher/libraryagreement.asp>).

#### 4. Term and Termination.

##### (a) Term and Termination for Convenience.

##### (i) This Agreement will have an initial term of three years.

(1) If Annual Revenues in year 3 are greater than \$5,000,000 dollars, then this Agreement will renew for an additional term of three years.

(2) If Annual Revenues in year 3 and beyond are greater than \$3,000,000 dollars; then, upon expiration of the term, and unless one party gives the other party 180 days prior written notice of its desire to terminate this Agreement; this Agreement will automatically renew for additional one-year terms.

(a) If netLibrary notifies Recorded Books of its desire to terminate this Agreement, then the Agreement will terminate after a one-year phase-out period. During this one-year period, all Section(s) of the Agreement, except Section(s) 1.(a) of Exhibit C and 4.(b) of Exhibit C, will apply.

(b) If Recorded Books notifies netLibrary of its desire to terminate this Agreement, then the Agreement will terminate after a three-year phase-out period. During this three-year period, all Section(s) of the Agreement, except Section(s) 1.(a) of Exhibit C and 4.(b) of Exhibit C, will apply.

(ii) If Annual Revenues in year 1 are less than \$750,000, Annual Revenues in year 2 are less than \$2,000,000, or Annual Revenues in Year 3 are less than \$3,000,000; then either party may give written notice to the other party of its desire to modify the Agreement at least 90 days before the end of the Contract year in question. The parties will use good faith efforts to discuss and mutually agree upon necessary program changes in order to meet revenue expectations. If the parties are not able to mutually agree upon necessary program changes during the 90 day period, then, the Agreement will expire, subject to Section 1.(e) of Exhibit B. For purposes of clarifying this Section 4.(a)(ii) and notwithstanding Section 2(a)(i) of the Agreement, "Annual Revenues in year 1" means the combined gross sales of Subscriptions by both Recorded Books and netLibrary from January 1, 2005 until September 9, 2005. Annual Revenues in year 2 and beyond will be calculated as specified in Section 2.(a)(i) of the Agreement.

(b) Termination for Cause. Either party (the non-breaching party) may terminate this Agreement at any time after providing the other party with 60 days' prior written notice of the occurrence of any of the following events, unless the other party cures or remedies the event within the 60-day period following receipt of the written notice (provided that a party must cure a breach for non-payment of amounts due under this Agreement within 30 days following receipt of the written notice):

(i) A party becomes or is declared insolvent or otherwise unable to pay its debts as they become due, or upon the filing of any proceeding (whether voluntary or involuntary) for bankruptcy, insolvency, or relief from creditors; or

(ii) A party violates any material provision of this Agreement or otherwise has committed breaches of this Agreement that, in the aggregate, are material. For purposes of this section 4(b)(ii); Sections 3, 5, 7, 9, and 10 of the Agreement; and Exhibits A and B, in their entirety; will be considered "material."

(c) Survival. Sections 3., 5., 6., 7., 8., 9., 10., 11.(c), and 11.(i) and other provisions to the extent expressly provided for therein, will survive termination of this Agreement.



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## 5. Representations and Warranties.

- (a) netLibrary represents and warrants that:
  - (i) it owns or has a license to all software and other intellectual property rights necessary to provide the services under this Agreement,
  - (ii) it will comply with all applicable federal, state and local laws and regulations,
  - (iii) it has the right and authority to enter this Agreement, and
  - (iv) it will use its reasonable commercial efforts to market, sell, and distribute Subscriptions to Bundled Collections under this Agreement.
- (b) Recorded Books represents and warrants that:
  - (i) it owns or has a license to all copyrights, trademarks, and other intellectual property rights associated with the Publisher Products necessary for netLibrary to publish, distribute, reproduce, or otherwise commercially exploit the NL Electronic Versions as contemplated in this Agreement;
  - (ii) any limitations on the rights of netLibrary in the NL Electronic Version will be accurately specified in connection with the submission of the Publisher Products under Section 2(b) of Exhibit B;
  - (iii) it will comply with all applicable federal, state and local laws and regulations,
  - (iv) it has the right and authority to enter into this Agreement and grant netLibrary the rights under this Agreement; and
  - (v) it will use its reasonable commercial efforts to market and sell Subscriptions to Bundled Collections under this Agreement.
- (c) netLibrary will be solely responsible for providing the Sales and Circulation Reports specified in Section(s) 2.(h)(i) and (ii) of Exhibit C. Recorded Books will be solely responsible for providing the Sales Report specified in Section 2.(h)(ii) of Exhibit C.
- (d) Recorded Books will be solely responsible for (i) all royalty, copyright, commissions, or other compensation payments due to the authors or owners of any right, title, or interest in or to the Publisher Products in connection with netLibrary's use of the same under this Agreement and (ii) any inaccuracies or errors in the Publisher Products delivered to netLibrary.

## 6. Warranty Disclaimer.

- (a) **RECORDED BOOKS AND NETLIBRARY ACKNOWLEDGE AND AGREE THAT THE NL ELECTRONIC VERSIONS ARE PROVIDED TO THE RECIPIENT "AS IS" WITHOUT CONDITION OR WARRANTY OF ANY KIND.**
- (b) **NETLIBRARY AND RECORDED BOOKS EXPRESSLY DISCLAIM ALL IMPLIED CONDITIONS AND WARRANTIES, INCLUDING, BUT NOT LIMITED TO, THE IMPLIED CONDITIONS AND WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE. NETLIBRARY AND RECORDED BOOKS DO NOT WARRANT, GUARANTEE OR MAKE ANY REPRESENTATIONS REGARDING THE USE, OR THE RESULTS OF THE USE OF THE NL ELECTRONIC VERSIONS. NO ORAL OR WRITTEN INFORMATION OR ADVICE GIVEN BY NETLIBRARY OR RECORDED BOOKS OR THE EMPLOYEES OF EITHER ORGANIZATION WILL CREATE A CONDITION OR WARRANTY OR IN ANY WAY INCREASE THE SCOPE OF THIS CONDITION OR WARRANTY, AND NEITHER PARTY MAY RELY ON ANY INFORMATION OR ADVICE OF THIS TYPE.**

## 7. Indemnification.

- (a) netLibrary will indemnify, defend, and hold harmless Recorded Books from any and all losses, damages, liabilities, costs, charges, and expenses, including reasonable attorneys' fees, arising out of (i) any breach of netLibrary's representations and warranties in this Agreement, (ii) any claim against Recorded Books that the NL System infringes rights of third parties, and (iii) any inaccuracy, error, or omission of in a NL Electronic Version introduced by netLibrary during the Production process.



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- (b) Recorded Books will indemnify, defend, and hold harmless netLibrary from any and all losses, damages, liabilities, costs, charges, and expenses, including reasonable attorneys' fees, arising out of (i) any breach of any of Recorded Books' representations and warranties in this Agreement, (ii) any claim against netLibrary that the NL Electronic Versions infringe rights of third parties in the Publisher Products, and (iii) any and all claims arising from any inaccuracy, error, or omission of a Publisher Product reproduced in a NL Electronic Version except for any errors in the NL Electronic Version introduced by netLibrary during the Production process.
- (c) In addition, without limiting the scope of the preceding provisions of this Section, if for any reason Recorded Books retracts any Publisher Product previously authorized for Distribution by netLibrary, Recorded Books will reimburse netLibrary, or netLibrary may claim a credit for, all refunds owing to Recipients with respect to NL Electronic Versions of that Publisher Product, unpaid Production Charges if any, and reasonable costs directly incurred by netLibrary in retracting the NL Electronic Version from its databases (such costs not to exceed \$50.00 per title).

#### **8. Limitation on Damages.**

Neither party will claim special, incidental, indirect, or consequential damages, including lost profits, (whether arising under tort, contract or any other legal theory, and regardless of whether a party foresaw such damages) for breach of this Agreement. Except for a breach of a party's representations and warranties, remedies will be limited to claims for amounts due, for injunctive relief as provided under this Section 8, or for indemnification as provided for under Section 7. Notwithstanding any other provision of this Agreement, a non-breaching party may seek injunctive relief in any court of competent jurisdiction to enjoin or restrain the breaching party from continuing to do any act or commit any violation or threatened breach of a material provision of this Agreement, and the prevailing party, if any, on a claim for injunctive relief will be entitled to recover its reasonable attorneys' fees incurred in connection with that proceeding. For purposes of this Section 8, Sections 3, 5, 7, 9, and 10 of the Agreement will be considered "material." Injunctive relief will be without prejudice to any other legal or equitable remedies which may be available to the non-breaching party.

#### **9. Intellectual Property Rights.**

- (a) Both parties agree that each has and will retain ownership rights to its own Confidential Information and any Intellectual or Industrial property rights covered or embodied by such Confidential Information. The parties further agree that, except for the graphical design, specifications, and standards and content templates associated with the Co-Branded Website discussed in Section 3.(b) of Schedule B-1, netLibrary is not providing the Services described in Exhibit B on a work-for-hire basis and that, except for the graphical design, specifications, and standards and content templates associated with the Co-Branded Website discussed in Section 3.(b) of Schedule B-1, Recorded Books will claim no rights in any works prepared by netLibrary under Exhibit B.
  - (i) netLibrary will own all rights in and to the graphical design, specifications, and standards and content templates associated with the Co-Branded Website discussed in Section 3.(b) of Schedule B-1
  - (ii) NetLibrary grants to Recorded Books a nonexclusive and nontransferable perpetual license to use the graphical design, specifications, and standards and content templates associated with the Co-Branded Website discussed in Section 3.(b) of Schedule B-1 for Recorded Books' subsequent business use.
- (b) As between Recorded Books and netLibrary, Recorded Books will own all rights in and to the Publisher Products and the content and copyright to the NL Electronic Version(s) of the Publisher Products. netLibrary will own all other rights in the NL Electronic Version(s) and the technology used to adapt, integrate, host, and serve the NL Electronic Version(s). netLibrary will include in the NL Electronic Version(s) and will not alter or remove any copyright or trademark notices contained in the Publisher Products.

#### **10. Confidential Information.**



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- (a) Confidential Information. "Confidential Information" means, subject to the exceptions set forth in Section 10(c) hereof, any information or data, regardless of whether it is in tangible form, disclosed by either party (the "disclosing party") that the disclosing party has either marked as confidential or proprietary, or has identified in writing as confidential or proprietary within thirty (30) days of disclosure to the other party (the "receiving party") or which would be apparent to a reasonable person, familiar with Disclosing Party's business and the industry in which each operates, to be of a confidential or proprietary nature the maintenance of which is important to the Disclosing Party; provided, however, that reports and/or information related to or regarding a disclosing party's business plans, strategies, technology, research and development, current and prospective customers, billing records, and products or services will be deemed Confidential Information of the disclosing party even if not so marked or identified, unless such information is the subject of any of the exceptions set forth in Section 10(c) hereof. For purposes of clarification, the parties agree that Audio Book content is not considered Confidential Information.
- (b) Use and Disclosure of Confidential Information. The receiving party acknowledges that it will have access to the disclosing party's Confidential Information. The receiving party agrees that it will not:
- (i) use any such Confidential Information in any way, for its own account or the account of any third party, except for the exercise of its rights and performance of its obligations under this Agreement, or
  - (ii) disclose any such Confidential Information to any party, other than furnishing such Confidential Information to
    - (a) its employees who are required to have access to the Confidential Information in connection with the exercise of its rights and performance of its obligations under this Agreement and
    - (b) professional advisers; provided that such employees and professional advisers are bound by written agreements or, in the case of professional advisers, ethical duties respecting such Confidential Information in accordance with the terms of this Section 10.

The receiving party agrees that it will not allow any unauthorized person access to disclosing party's Confidential Information, and that receiving party will take all action reasonably necessary to protect the confidentiality of such Confidential Information, including implementing and enforcing procedures to minimize the possibility of unauthorized use or copying of such Confidential Information. In the event that the receiving party is required by law to make any disclosure of any of disclosing party's Confidential Information, by subpoena, judicial or administrative order or otherwise, the receiving party will first give written notice of such requirement to the disclosing party, and will permit the disclosing party to intervene in any relevant proceedings to protect its interests in the Confidential Information, and provide full cooperation and assistance to the disclosing party in seeking to obtain such protection. Upon the termination of this Agreement, at the request of the Disclosing Party, and unless otherwise permitted by this Agreement, the Receiving Party will destroy or return to the Disclosing Party all originals, copies, and summaries of documents, materials, and other tangible manifestations (including media on which machine-readable versions of Confidential Information are stored) of Confidential Information in the possession or control of the Receiving Party.

- (c) Exceptions. Information will not be deemed Confidential Information hereunder if such Information:
- (i) is known to the receiving party prior to receipt from the disclosing party directly or indirectly from a source other than one having an obligation of confidentiality to the disclosing party;
  - (ii) becomes known (independently of disclosure by the disclosing party) to the receiving party directly or indirectly from a source other than one having an obligation of confidentiality to the disclosing party;



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- (iii) becomes publicly known or otherwise ceases to be secret or confidential, except through a breach of this Agreement by the receiving party; or
- (iv) is independently developed by the receiving party.

(d) The rights and obligations set forth in Section 10 will survive for three (3) years after termination of the Agreement.

#### 11. General Provisions.

- (a) Entire Agreement. This Agreement and any exhibits and addenda incorporated herein set forth the entire agreement between the parties and supercede and replace all prior and contemporaneous discussions and agreements. Modification or amendment of any provision of this Agreement must be in writing and signed by a duly authorized representative of each party. In the event of a conflict between the terms of this Agreement and the terms of any Exhibit to this Agreement, the terms of the Exhibit will control. All amounts due and payable under this Agreement are recorded and invoiced, and due and payable, in U.S. dollars.
- (b) Assignment. Neither party may assign this Agreement or any of its rights or obligations without the prior written consent of the other party; provided that no consent will be required for an assignment by either party to any party that acquires all or substantially all of the assets of the party to which this Agreement relates. This Agreement will be binding upon and inure to the benefit of any permitted successors and assigns of the parties.
- (c) Governing Law, Venue, and Jurisdiction. This Agreement will be governed by and construed in accordance with the laws of the State of New York, U.S.A. (without reference to its choice of law rules). NetLibrary and Recorded Books irrevocably consent to exclusive personal jurisdiction and venue in the state and federal courts located in any state where either party has a principal place of business with respect to any actions, claims or proceedings arising out of or in connection with this Agreement, and agree not to commence or prosecute any such action, claim or proceeding other than in the aforementioned courts. The United Nations Convention on Contracts for the International Sale of Goods, however designated, shall not apply to this Agreement.
- (d) Severability. If any provision of this Agreement is held invalid, unenforceable, or illegal for any reason, that provision will be deemed to apply only to the maximum extent permitted by law, and the remainder of this Agreement will remain valid and enforceable in accordance with its respective terms.
- (e) Force Majeure. Neither party will be liable for any failure or delay in performance under this Agreement (other than for delay in the payment of money due and payable under this Agreement) to the extent said failures or delays are proximately caused (i) by causes beyond that party's reasonable control and occurring without its fault or negligence, or (ii) by the failure of the other party to substantially meet its performance obligations under this Agreement, provided that, as a condition to the claim of nonliability, the party experiencing the difficulty will give the other prompt written notice, with full details, following the occurrence of the cause relied upon. Dates by which performance obligations are scheduled to be met will be extended for a period of time equal to the time lost due to any delay so caused.
- (f) Waiver. No term of this Agreement will be deemed waived, and no breach consented to, unless such waiver or consent will be in writing and signed by the party claimed to have waived or consented. No waiver of any rights or consent to any breaches will constitute a waiver of any other rights or consent to any other breach.
- (g) No Partnership. The relationship of the parties is that of independent contractors, and no agency, employment, partnership, joint venture, or any other relationship is created by this Agreement.
- (h) No Third Party Beneficiaries. This Agreement is not intended to confer any benefit on any person or entity not a party to this Agreement.

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- (i) **Notice.** Any notice or other communication required or allowed under this Agreement will be in writing and will be deemed given: (i) upon actual delivery to an officer of the receiving party, if delivery is by hand, (ii) upon receipt by the transmitting party of confirmation or answer back if delivery is by telex, telegram, facsimile, or electronic mail or (iii) upon deposit with the public mail if sent by registered mail or certified, return-receipt-requested mail, postage prepaid. Mailed or transmitted notices will be sent to the parties at the addresses set forth below:

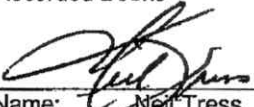
	If to netLibrary:	If to Recorded Books:
	netLibrary, a division of OCLC Online Computer Library Center, Inc.	Recorded Books LLC
Address:	4888 Pearl East Circle, Suite 103	270 Skipjack Road
Address:	Boulder, Colorado 80301	Prince Frederick, MD 20678
Attention:	Publishing	Brian T. Downing
Telephone:	(303) 415-2548	(410) 535-5590 ext. 1142 (800) 638-1304
Facsimile:	(303) 381-8600	(410) 535-0257
e-mail address:	publishing@netlibrary.com	downingbt@aol.com
With a copy to:	General Counsel	Neil Tress
Facsimile:	(303) 381-8999	(410) 535-2761


or at such other address as the parties may designate by notice given under this Section.

IN WITNESS WHEREOF, authorized representatives of the parties have executed this Agreement as of the Effective Date set forth below.

Recorded Books

netLibrary, a division of OCLC Online Computer Library Center, Inc.

  
 Name: Neil Tress  
 Title: Chief Financial Officer  
 Telephone: 410-535-5590 ext 1107  
 Fax: 410-535-2761  
 Address: 270 Skipjack Rd. Prince Frederick MD 20678  
 e-mail: ntress@recordedbooks.com  
 Date: 9/10/04

  
 Name: Richard L. Rosy  
 Title: OCLC Vice President, netLibrary  
 Telephone: \_\_\_\_\_  
 Fax: \_\_\_\_\_  
 Address: \_\_\_\_\_  
 e-mail: \_\_\_\_\_  
 Date: 9-16-04





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## Exhibit A – Production of NL Electronic Versions of Publisher Products

### 1. Delivery of Publisher Products.

- (a) Formats. Recorded Books may deliver Publisher Products to netLibrary in any of the following formats: (1) an Audio Book File or (2) a Third-Party File, or (3) a format mutually agreed upon by the parties. Recorded Books will also provide metadata and other information; including bibliographic information, territory restrictions, and rights information; in a format specified by netLibrary. The metadata submission form is available electronically at [http://www.netlibrary.com/extranet/Recorded\\_Books/specifications/](http://www.netlibrary.com/extranet/Recorded_Books/specifications/).
- (b) Rights. If Recorded Books delivers a Publisher Product to netLibrary without specifying any rights that have not been cleared or that are otherwise restricted, then Recorded Books is representing that all rights to the Publisher Product have been cleared and that netLibrary is authorized to take all actions with respect to the Publisher Product and related NL Electronic Version that are contemplated by this Agreement.
- (c) Shipments. Recorded Books will deliver Publisher Products electronically to netLibrary by using netLibrary's Title Track submission interface, FTP, or other suitable electronic transfer means specified by netLibrary. Unless otherwise requested, Recorded Books should send Publisher Products on tangible media to netLibrary at the following address:

4888 Pearl East Circle, Suite 103  
Boulder, CO 80301  
Attn: Production

Recorded Books will bear shipping costs.

### 2. File Assessment.

- (a) In order to host and offer Publisher Products for sale, netLibrary must create a NL Electronic Version of the Publisher Products. The format in which Recorded Books delivers Publisher Products will affect what action netLibrary must take in order to create a NL Electronic Version of the Publisher Products. netLibrary may reject any file or copy that does not comply with the applicable netLibrary file format specification or that netLibrary, in its reasonable discretion, determines is not suitable for distribution or Production.
- (b) Recorded Books is solely responsible for the accuracy of the content in, and the condition of, any file or copy that it provides to netLibrary; the format, layout, and style of the content in any file or copy that it provides to netLibrary; and the compliance of any file or copy with the netLibrary file format specifications. Recorded Books will promptly correct or replace any part of a Publisher Product which is defective, damaged, or does not conform to a netLibrary file format specification.

### 3. Production.

- (a) Production Authorization. Recorded Books authorizes netLibrary to perform the Production services necessary to convert the Publisher Products into NL Electronic Versions of the Publisher Products that comply with the applicable netLibrary file format specification.
- (b) Production Activities. netLibrary will perform the Production necessary to create the NL Electronic Version from the Publisher Product and load the NL Electronic Version onto netLibrary's platform for display to authorized Recipients.
  - (i) Audio Book Production requires several activities. These steps include, but are not limited to:
    - Recorded Books will submit Audio Book(s) in a mutually agreed upon format.



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- netLibrary will create a WMA Version of the Audio Book(s) submitted by Recorded Books.
  - netLibrary will encode the WMA Version of the Audio Book(s) to create two versions of the source file – a low bit rate version and a high bit rate version ("Audio Book Production File(s)").
  - netLibrary will use Microsoft SDK Software to create DRM protected versions of the Audio Book Production File(s).
  - netLibrary will load the Audio Book Production File(s) to the Publisher Extranet.
  - netLibrary and Recorded Books will perform QA of the Audio Book Production File(s).
  - netLibrary will load the Audio Book Production File(s) to the live-site.
  - netLibrary will load the Audio Book Production File(s) to the Archive.
- (ii) netLibrary will use reasonable commercial efforts to load the NL Electronic Version onto the NL Platform within a commercially reasonable time after netLibrary's receives Publisher Product(s) that comply with the applicable netLibrary file format specification.
- (c) Third-party Vendors. netLibrary may engage third-party vendors of its choice to perform some or all of the work necessary to perform the Production Activities. Neither Party will disclose any Confidential Information of the other Party to such third-party vendor(s), except in accordance with Section 10(b) of this Agreement. Nothing in this Agreement will restrict Recorded Books from granting to any third party the right to convert Publisher Products into electronic versions using a third-party conversion vendor or third-party format.
- (d) Quality Assurance. netLibrary will perform quality assurance as appropriate to assure that electronic files produced under this Agreement conform to the netLibrary file format specifications. netLibrary will promptly correct or replace any part of a NL Electronic Version of a Publisher Product which is defective, damaged, or does not conform to a netLibrary file format specification and is the result of the netLibrary Production Process. netLibrary will not otherwise modify the electronic files without Recorded Books approval.
- (e) File Review. netLibrary will provide Recorded Books with a complementary account to the Publisher Extranet, available at [www.netlibrary.com/extranet/publisher](http://www.netlibrary.com/extranet/publisher) ("Publisher Extranet"). Recorded Books can view the NL Electronic Version(s) of Publisher Products through the Publisher Extranet.
- (i) netLibrary will not upload NL Electronic Version(s) to netLibrary's platform for 5 days after netLibrary uploads the NL Electronic Version(s) to the Publisher Extranet ("File Review Period"). Notwithstanding the preceding sentence, netLibrary will not upload NL Electronic Version(s) of Publisher Products submitted to netLibrary between September 1, 2005 and October 31, 2005 to netLibrary's platform for 15 days after netLibrary uploads the NL Electronic Version(s) to the Publisher Extranet. Recorded Books will approve or reject new NL Electronic Version(s) during the File Review Period. If Recorded Books rejects a new NL Electronic Version(s) during the File Review Period; then Recorded Books will notify netLibrary in writing and provide a reason for the rejection. NetLibrary will investigate, and, if necessary, correct the problem.
- (ii) The live date of NL Electronic Versions of the Publisher Products will occur upon the earlier of Recorded Books' approval or the end of the File Review Period. If Recorded Books does not reject a new NL Electronic Version(s) by the end of the File Review Period, then Recorded Books is deemed to have approved the NL Electronic Version(s) and netLibrary may upload the NL Electronic Version(s) to netLibrary's platform.

#### **4. Production Charges, Invoicing, and Payment.**

##### **(a) Production Charges.**

- (i) The Production Charges are set forth in Schedule B-1.

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- (ii) Note: netLibrary may amend Schedule B-1 upon 60 days' prior written notice to Recorded Books. If Recorded Books delivered Publisher Products to netLibrary before the date of the notice, then the pre-existing Charges will apply. The amended Charges will apply to all Productions of Publisher Products that occur more than 60 days after the date of the notice.
- (b) Invoicing and Payment. netLibrary and Recorded Books have agreed to split the cost of Production. netLibrary will invoice Recorded Books for 50% of the Charges described in this Exhibit A Section 4. on a monthly basis. netLibrary may recoup fees incurred by Recorded Books from amounts netLibrary owes to Recorded Books under this Agreement for aggregate sales of NL Electronic Versions. Unless otherwise agreed in writing, Recorded Books will pay any amounts netLibrary is unable to recoup within 30 days following the end of the invoice month.

## 5. Archive.

- (a) Permitted Copies. netLibrary will make, deposit, and store in archive a copy of each NL Electronic Version. Except as provided in this Agreement, netLibrary will not provide Subscription access to the nL Electronic Versions to a third-party without paying the required fees to Recorded Books. Under this Agreement, the temporary appearance of an NL Electronic Version in the random access memory of a user's computer will not constitute a reproduction for which fees are due.
- (b) Upon termination of this Agreement, then, in addition to Section 1.(e) of Exhibit B; Recorded Books can notify netLibrary in writing to provide Recorded Books a copy of an NL Electronic Version of each Publisher Product.
- (i) If the NL Electronic Version of the Publisher Product has been available for sale and distribution under this Agreement for at least 3 years, then netLibrary will provide a copy of the NL Electronic Version of the Publisher Products to Recorded Books at no additional charge.
- (ii) If the NL Electronic Version of the Publisher Product has been available for sale and distribution under this Agreement for 3 years or less, then netLibrary will provide a copy of the NL Electronic Version of the Publisher Products to Recorded Books if Recorded Books pays netLibrary for the balance of the Production Charges associated with the Product (i.e. 50% of the Production Costs).



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### Schedule A-1 - Production Charges

#### 1. Production Charges.

Table 1.1

Input / Output Formats and Production Charges	Audio Book File to specification published by netLibrary			
	Audio Book File (input format is WMA)	Audio Book File (input format is WAV)	Audio Book File (input format is MP3)	Audio Book File (input format is CD or DVD.)
Output Format	Audio Book File (output format is WMA)	Audio Book File (output format is WMA)	Audio Book File (output format is WMA)	Audio Book File (output format is WMA)
Audio Book – Production Charge	TBD	TBD	TBD	\$150.00 Per File

Recorded Books will deliver Publisher Products to netLibrary in a mutually-agreed upon formats that meets the applicable netLibrary file format specifications. If Recorded Books delivers Publisher Products to netLibrary in a mutually-agreed upon format that meets the applicable netLibrary file format specifications, then Recorded Books and netLibrary will each pay 50% of the cost of the Production Charges for these Publisher Products.

#### 2. Audio Book File Submittal

- (a) Recorded Books has informed netLibrary that it will submit the first 500 titles under this Agreement as CD-Roms and that it will submit the Title Covers for the first 500 titles under this Agreement as electronic jpeg files.
- (b) Recorded Books will use its reasonable commercial efforts to submit subsequent Audio Book titles in a digital file format (i.e. WMA, WAV, or MP3) that complies with the applicable netLibrary specification and the netLibrary Audio Book Submission Guidelines. Recorded Books will complete and submit the standard metadata worksheet for all titles.

#### 3. Cataloging Audio Book(s)

OCLC will catalog the metadata for the Audio Book File(s) and generate MARC records for delivery to Recipients that purchase the Recorded Books/netLibrary Audio Book offering. Recorded Books will submit to netLibrary any information that is reasonably necessary for OCLC to catalog the Audio Book Files.



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### Exhibit B - Hosting Services

#### 1. netLibrary Services.

- (a) Services. netLibrary will use reasonable commercial efforts to perform the Services and assure that the Services are performed in a manner consistent with the specifications contained in this Exhibit and Schedule B-1 - the Technical Specification.
- (b) netLibrary and Recorded Books agree that the Services will be used to provide Subscriptions to Bundled Collections to Recipients.
- (c) Creation of Co-Branded Website. Co-Branded Website Creation Activities are discussed in Section 3.(b) of Schedule B-1:
  - (i) Recorded Books will pay netLibrary 50% of the cost of establishing a co-Branded Web Site. The estimated expense for this activity is \$25,000.
- (d) Hosted Services. Hosted Service Activities include:
  - (i) The interface and NL System activities reasonably necessary to ensure the site functionality specified in Section 3 and 4 of Schedule B-1.
  - (ii) The network and infrastructure activities reasonably necessary to ensure site maintenance and stability, and to avoid material disruptions in service, including the activities specified in Section 5 of Schedule B-1.
  - (iii) The activities reasonably necessary to ensure the performance of the order processing, submittal, fulfillment, and customer support functions specified in Section 6 of Schedule B-1.
  - (iv) A reasonable quantity of periodic training, account/project management, database management and report management.
  - (v) A reasonable quantity of customer support to Recipients, with said support including:
    - (1) Responding in a timely fashion to Recipients' Support Queries.
    - (2) Maintaining resources to respond to Recipients' Support Queries.
    - (3) Maintaining documentation of netLibrary's responses to Recipients' Support Queries.
- (e) Transition of Services.
  - (i) In the event of termination, netLibrary will use good faith commercially reasonable efforts to assist with, and will make its staff available to assist with, the transition of Services to Recorded Books, or a third party specified by Recorded Books. netLibrary will be compensated based on mutually agreeable hourly rates, not to exceed the rate for Additional Services set forth in Section 3.(a) of Exhibit B. If Recorded Books terminates the Agreement because netLibrary has materially breached the Agreement, then netLibrary will waive the fees for a reasonable amount of transition services for a reasonable period of time not to exceed 60 days after the Termination of the Agreement.
  - (ii) In the event of termination, netLibrary and Recorded Books must return all confidential information or certify in writing that they have destroyed it. netLibrary will return all disks or other tangible media provided to it by Recorded Books or will certify in writing that it has destroyed all of the disks or other tangible media. netLibrary will shut down the co-Branded website.
  - (iii) netLibrary will on the effective date of termination cease selling and marketing Subscriptions to the Bundled Collection(s) but netLibrary may continue to host and distribute copies of NL Electronic Versions of the Audio Books contained in the Bundled Collection(s) to Recipients with Subscription Terms that expire after the Termination of the Agreement if netLibrary gives Recorded Books written notice of the identity of these Recipients. Upon expiration of all Subscriptions that were active at the time the Agreement terminated, netLibrary will send

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written notice to Recorded Books confirming that all Subscriptions that were active at the time the Agreement terminated have expired and that netLibrary has ceased distributing NL Electronic Versions of the Audio Books contained in the Bundled Collection(s) to Recipients.

(f) Additional Services

If the parties mutually agree netLibrary should perform any additional services in order to modify the co-branded website to support the Recorded Books-netLibrary Offering, then Recorded Books will pay netLibrary 50% of the cost of the additional services.

(g) Invoices/Manner of Payment.

netLibrary will provide Recorded Books with a monthly invoice, in a mutually agreeable format and level of detail, stating all amounts due from Recorded Books to netLibrary under this Exhibit. Recorded Books will pay netLibrary within 30 days following the end of the invoice month.

**2. Recorded Books Obligations**

(a) Recorded Books will perform the following activities in order to obtain Services in accordance with the Agreement:

- (i) Recorded Books will cooperate with netLibrary and will provide the information or support reasonably necessary for netLibrary to perform Production Activities, Co-Branded Website Creation Activities; Hosted Service Activities; Trial Activities, if any; and Additional Services, if any.
- (ii) Recorded Books will use the online order form to notify netLibrary to establish, terminate, or otherwise modify Recipient accounts, and will submit the documentation specified in Section 6.(a)(i) of Schedule B-1.

(b) Opportunity to Review co-Branded site and NL System

After the co-branded site and NL System, in netLibrary's reasonable opinion, satisfy the technical requirements described in Exhibit B and Schedule B-1 and the NL System is ready to fulfill orders for Audio Book Subscription(s); netLibrary will give Recorded Books written notice that the co-branded site and NL System are ready for Recorded Books' review. Recorded Books will have five (5) business days from receipt of such notice in which to review the co-branded site and NL System. If Recorded Books' review of the co-branded site and NL System raises any concerns, then Recorded Books will give written notice of its concerns to netLibrary and the parties will promptly organize a conference call or meeting to discuss these concerns.



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### **Schedule B-1 – Technical Specification**

#### **1. Definitions**

(a) As used in this Agreement:

- (i) "Checkout" means the process by which the NL System checks out a nL Electronic Version of an Audio Book to a Patron's netLibrary account, Downloads the Audio Book file to a Patron's computer or other device, and Downloads the Audio Book File License to the Patron's computer or other device. A Checkout is good for 21 days. Each checkout will trigger a royalty payment under Section 2.(d) of Exhibit C.
- (ii) "Download" means the process by which the NL System Downloads an Audio Book file to a Patron's computer or other device. There may be multiple Downloads due to interruptions, Download failures, etc. related to a single Checkout but there should not be multiple Checkouts related to a single Download. In other words, during the Checkout and Renewal period(s), only one Checkout and multiple Renewals could be related to a single Download.
- (iii) "File License" means an electronic file containing the license allowing playback of an Audio Book file.
- (iv) "Renewal" means the action Patron takes to renew a File License for an Audio Book File within 24 days of the grant of the File License. A Renewal is not counted as a Checkout. A Renewal does not trigger a royalty payment under Section 2.(d) of Exhibit C.

(b) Any capitalized term appearing in this Schedule without a definition will have the meaning attached to it in the Agreement.

#### **2. Audio Books Collection and Access Model**

- (a) netLibrary and Recorded Books have agreed to grant access to Authenticated Patrons of a Recipient that purchases the Recorded Books/netLibrary Audio Book offering. The parties have further agreed upon Digital Rights Management provisions that apply to the Recorded Books/netLibrary Audio Book offering and are listed in Section 4.(b) below. Patrons can either Checkout and Download titles, or Renew previously Downloaded titles.
- (b) The price of the Recorded Books/netLibrary Audio Book offering is flat fee based on a "not to exceed" number of Checkouts as determined to be reflective of general circulation trends for that size and type of Recipient. The price of the Recorded Books/netLibrary Audio Book offering is further described in Exhibit C to the eContent Production and Distribution Agreement between Recorded Books and netLibrary. As Checkouts are a unit of measure for pricing, netLibrary will not allow Checkouts if a Patron has a current File License at the time of the request. If a Patron with a current File License for an Audio Book clicks the Audio Book Download Link for the Audio Book, then the NL System will renew the File License for the Audio Book File.

#### **3. Interface**

- (a) netLibrary will offer 3 access points from which Patrons of Recipients that purchase the Recorded Books/netLibrary Audio Books offering will be able to discover and download Audio Books. They will be able to discover and download Audio Books from:
  - (i) the co-branded netLibrary / Recorded Books site,
  - (ii) MARC records for Audio Book titles loaded in their library's catalog or in OCLC's WorldCat catalog, and
  - (iii) their library's affiliated netLibrary site, if applicable.
- (b) *netLibrary / Recorded Books Site*

netLibrary will design and develop a new co-branded site specific to the Recorded Books/netLibrary Audio Book offering. The site will contain information about the offering, the ability to search/browse the offering, links to a Recipient's affiliated netLibrary site for Checkout and Download, links to the Recorded Books site and the netLibrary site, a login to access a Recipient's affiliated netLibrary site, and links to purchase Audio Book players from Recorded Books.



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(c) **MARC Records for Audio Books**

netLibrary will provide Recipients that purchase the Recorded Books/netLibrary Audio Book offering with MARC records for all Audio Books in the offering at no additional charge.

(d) **Affiliated netLibrary Site**

- (i) If a Recipient already possesses a netLibrary Site (because it has previously purchased eContent from netLibrary), and the Recipient purchases, the Recorded Books/netLibrary Audio Book offering, then netLibrary will expand the Recipient's affiliated netLibrary site to include Audio Books.
- (ii) If a Recipient does not already possess a netLibrary Site (because it has not previously purchased eContent from netLibrary), and the Recipient purchases, the Recorded Books/netLibrary Audio Book offering, then netLibrary will create an affiliated netLibrary site for the Recipient. Because the Recipient has not purchased any other eContent from netLibrary, the affiliated netLibrary site will only include the Audio Books that are part of the Recorded Books/netLibrary Audio Book offering.

**4. NL System**

(a) When a Patron clicks the Audio Book Download Link on one of the Audio Book Interfaces, the NL System will perform the following steps:

- (i) the NL System will check out the Audio Book to the Patron for 21 days.
- (ii) the NL System will deliver a license to access the Audio Book for the specified Checkout period to the Patron's computer or other device.
- (iii) the NL System will Download the audio book file from the netLibrary to the Patron's computer or other device one of two different encoding levels: low band-width (7 Kbps) and high band-width (37 Kbps).

(b) **DRM Standards** - Recorded Books and netLibrary have agreed on the following DRM standards.

- (i) DRM will be engaged to limit the number of audio books an authenticated Patron can check out at one time to 3.
- (ii) DRM will be engaged to restrict the Checkout period to 21 days.
- (iii) DRM will be engaged to restrict CD burning.
- (iv) DRM will not be engaged to restrict Audio Book File transfers between devices, but DRM will be engaged to restrict the maximum number of Audio Book File transfers from one device to another to 3.
- (v) DRM will not be engaged to restrict the number of times a file can be played during the Checkout period.
- (vi) DRM will not be engaged to restrict Renewals.

(c) At this time, the NL System will only offer Audio Books in WMA format.

(i) The following is a table listing software programs that support secure WMA playback.

Software Program	Supported Operating Systems
Microsoft Windows Media Player 9 <a href="http://www.microsoft.com/windows/windowsmedia/">www.microsoft.com/windows/windowsmedia/</a>	<ul style="list-style-type: none"> <li>▪ Microsoft Windows (98 SE, Me, 2000, XP)</li> <li>▪ Mac OS X</li> </ul>
Musicmatch Jukebox 8.2 <a href="http://www.musicmatch.com">www.musicmatch.com</a>	<ul style="list-style-type: none"> <li>▪ Microsoft Windows (98 SE, Me, 2000, XP)</li> <li>▪ Mac OS X</li> </ul>
Nullsoft Winamp 5 <a href="http://www.winamp.com">www.winamp.com</a>	<ul style="list-style-type: none"> <li>▪ Microsoft Windows (98 SE, Me, 2000, XP)</li> </ul>

(ii) The following is a brief listing of some of the more popular portable music devices that support secure WMA playback.

- Creative Nomad series player(s), including Jukebox(s),

Jukebox Zen(s), and Jukebox MuVo(s)

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- Dell Digital Jukebox series player(s)
- Gateway DMP series player(s)
- iRiver iFP series player(s)
- irock! series player(s)
- RCA RD player(s)
- Rio series player(s), including 800, 900, Call, Chiba, Eigen, Fuse, Karma, Nitrus, Sport, and others
- Samsung Yepp series player(s)

For a full listing, please visit:

[www.microsoft.com/windows/windowsmedia/9Series/GettingStarted/Personalization/CoolDevices.asp](http://www.microsoft.com/windows/windowsmedia/9Series/GettingStarted/Personalization/CoolDevices.asp)

(d) Eventing and Reporting

(i) The NL System will track and allow reporting of the following data points:

- Number of Checkouts – Used by Recorded Books for royalty payment to authors. Used to determine institutional license fees by size. A cap will be placed on maximum number of Checkouts for a library of a particular size.
- Number of Renewals – In aggregate with Number of Checkouts used to report to Recipients the number of accesses of Audio Books by Patrons
- Number of Audio Book File Downloads – Used internally by netLibrary for infrastructure support.

(ii) If a need for reports of other types of data (e.g. the hottest search terms, page views, click-throughs to other sites, site visits) becomes apparent, then Recorded Books and netLibrary will mutually agree upon the schedule and budget for adding such reports.

**5. Network and Infrastructure**

- (a) Storage - In the initial phases of this project, netLibrary will use existing hardware to satisfy Audio Book File storage needs. netLibrary is in the process of implementing a Storage Area Network (SAN). The SAN will be used as the long term storage solution for Audio Book Files.
- (b) Networking/Bandwidth Usage – In the initial phases of this project, netLibrary will use existing ISP routers for Audio Book File Download traffic. As Recipients purchase Audio Book Subscriptions, bandwidth demand is likely to increase. netLibrary will monitor Audio Book File Download activities and will take the steps that are commercially reasonable to ensure that it has adequate bandwidth to satisfy expected bandwidth demand.

**6. Order Processing, Submittal, Fulfillment, and Customer Support**

(a) Order Processing and Submittal

- (i) As Recorded Books Sales Agents sell Subscriptions to the Bundled Collection(s), they will prepare, obtain, and submit to Recorded Books the documentation necessary to document the Sale of the Subscription(s). This documentation will include a completed order form, a Purchase Order from the Recipient purchasing the Subscription(s), and a signed copy of a Library Audio Book Agreement. Recorded Books will collect this information and submit it to netLibrary on a regular basis.
- (ii) As OCLC Sales Agents sell Subscriptions to the Bundled Collection(s), they will prepare, obtain, and submit to netLibrary the documentation necessary to document the Sale of the Subscription(s). This documentation will include a completed order form, a Purchase Order from the Recipient purchasing the Subscription(s), and a signed copy of a Library Audio Book Agreement.

(b) Order Fulfillment and Customer Support

- (i) NetLibrary will establish a communication channel for receiving, accepting, fulfilling, and recording orders for Audio Book Subscription(s) submitted by Recorded Books or OCLC.

*Handwritten signature*



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- (ii) netLibrary will use its Online Account Management System to fulfill orders for Audio Book Subscription(s). The Online Account Management System consists of two sections: the account set-up and maintenance portion and the title fulfillment portion. netLibrary will enter and update information in the account management system as necessary in order to provide services to Recipients.
- (iii) Organization Settings – netLibrary and Recorded Books have agreed to use the following settings to standardize the Patron experience:
  - Access – All titles will be offered to Recipients with access on the basis described in Exhibit C, Section 2.(a).
  - Patron Account Creation – Individual Patrons will be able to create their own accounts.
  - Welcome Email – The Online Account Management System will send a Welcome email to Recipients.
  - Contact Us Emails – The Online Account Management System is designed to direct all emails submitted by Patrons via "Contact Us" to netLibrary.
- (iv) Customer Support - NetLibrary will use commercially reasonable efforts to provide Customer Support to and will serve as the primary point of contact for Recipients that purchase Subscriptions to the Bundled Collection(s). netLibrary will use existing Customer Support processes to perform this obligation.
- (v) Reporting – netLibrary will provide access to the netLibrary Library Resource Center (LRC) to Recorded Books. Recorded Books can use the LRC to review information about Subscriptions purchased by Recipients and retrieve reports about Audio Book usage by Patrons. The LRC is netLibrary branded. Recorded Books can use the LRC to:
  - Administration – obtain information about Recipient Patron accounts and authentication information (IP's on file for an organization).
  - Reporting – obtain two types of reports - usage reports and collection reports.
  - Recorded Books will be able to run usage reports for Recipients on an aggregated and single Recipient basis. Usage report types include popular audioBooks, Activity by Title, and Activity by Subject. Collection reports include a listing of owned titles. Recorded Books may Download all LRC reports in a tab-delimited format.



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### Exhibit C – Audio Book Commercial Terms

#### 1. Special Terms Applicable to Audio Books.

- (a) The Subscription sales model described in this Agreement is the exclusive means by which netLibrary will market, distribute, and sell to Recipients digital electronic versions of Audio Books that can be downloaded via the Internet. The Subscription sales model described in this Agreement is the exclusive means by which Recorded Books will market, distribute, and sell to Recipients digital electronic versions of Audio Books that can be downloaded via the Internet. netLibrary and Recorded Books will allow other content providers to contribute content and to participate in this Subscription sales model on equivalent terms. If, without Recorded Books' consent, netLibrary signs an Agreement to allow another content provider to contribute Audio Book content and to participate in a Subscription sales model to which Recorded Books is not a party; then, subject to Section 1.(e) of Exhibit B, Recorded Books may give netLibrary written notice terminating this Agreement immediately.
- (b) Recorded Books and netLibrary will agree in writing on the nL Electronic Versions of Publisher Products that comprise a Bundled Collection. Recorded Books and netLibrary may agree in writing to add additional nL Electronic Versions of Publisher Products to a Bundled Collection at any time.
- (b) A Recipient that purchases a Subscription to a Bundled Collection will receive an annual license to access the Bundled Collection. The Recipient will not own any other rights in the Bundled Collection.
- (c) A Recipient that purchases a Subscription to a Bundled Collection will receive concurrent access for its end-users to the Bundled Collection on the basis specified in Exhibit C. Section 2.(a).
- (d) netLibrary and Recorded Books will meet periodically, but no less than once every 6 months, to review both parties' performance under this Agreement. Such meetings will take place via telephone or other means mutually agreed upon by the parties. Each party will bear its own costs incurred in connection with such meetings. The topics that may be discussed at these meetings include, but are not limited to: sales, technical, marketing, and promotional activities; the composition of the Bundled Collection; the List Price(s) of a Subscription to the Bundled Collection; and expansion of the scope of this Agreement to cover other types of digital content (e.g. music or video)

#### 2. Subscription Pricing and Payments.

- (a) List Price of Subscription to Bundled Collection.
  - (i) Recorded Books and netLibrary will mutually agree upon the Standard and Promotional List Price(s) upon which they will offer a Subscription to the Bundled Collection. The parties may mutually agree to change these prices or the applicable qualifying criteria at any time, but otherwise, they will remain in effect for the initial Term of the Agreement. Any List Price increase will only be effective as to Subscription sales completed after the effective date of the price change.
  - (ii) The parties have agreed that the List Price for a Subscription to the Bundled Collection for the first year of this Agreement will be based upon the overall Circulation of the Recipient purchasing the Subscription.
    - (1) Libraries are classified into 1 of 5 groups based on their circulation. They shall be charged a yearly institutional license fee based on this classification.

Table 2.1

	Public (based on Annual Circulation)	Academic (based on Full Time Equivalents (FTE))	Special

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Category 1:	under 100,000	1,999 or less	The parties have agreed to address sales to Special Libraries on an Individual Case Basis.
Category 2:	100,000 to 500,000	2,000-9,999	
Category 3:	500,000 to 1,000,000	10,000 or more	
Category 4:	1,000,001- 5,000,000	Not Applicable	
Category 5:	5,000,000 or more	Not Applicable	

- (2) The Standard List Price(s) for a Subscription to the Bundled Collection will apply unless a Library purchasing a Subscription meets the qualifying criteria for the Promotional List Price(s). The Standard List Price(s) for a Subscription to the Bundled Collection for the first year of this Agreement are as follows:

- (a) Category 1: \$3,000 per year (up to 3,500 check-outs)
- (b) Category 2: \$6,000 per year (up to 7,500 check-outs)
- (c) Category 3: \$12,000 per year (up to 15,000 check-outs)
- (d) Category 4: \$30,000 per year (up to 50,000 check-outs)
- (e) Category 5: \$60,000 per year (up to 100,000 check-outs)

- (3) The Promotional List Price(s) for a Subscription to the Bundled Collection will apply to Libraries that purchase a Subscription to the Bundled Collection between October 1, 2004 and December 31, 2004. The Promotional List Price(s) for a Subscription to the Bundled Collection for the first year of this Agreement are as follows:

- (a) Category 1: \$2,500 per year (up to 3,500 check-outs)
- (b) Category 2: \$5,000 per year (up to 7,500 check-outs)
- (c) Category 3: \$10,000 per year (up to 15,000 check-outs)
- (d) Category 4: \$25,000 per year (up to 50,000 check-outs)
- (e) Category 5: \$50,000 per year (up to 100,000 check-outs)

- (4) A cap will be placed on maximum number of checkouts for a Library. The Patron(s) of a Library that purchases a Subscription to a Bundled Collection may check-out up to the number of Audio Books specified in the previous table for the Category of access purchased by the Library, but the NL System will not allow Patrons of a Library that purchases a Subscription to a Bundled Collection to check-out more than the number of Audio Books specified in the previous table for the Category of access purchased by the Library.

- (5) If the Patrons of a Library that purchases a Subscription to a Bundled Collection check out the maximum number of Audio Books specified in the table above for the Category of access purchased by the Library, then the party that sold the Subscription will contact the Library to provide a quotation for additional check-outs.

- (iii) The parties have further agreed that different terms may be agreed to for other publishers' audio books, music content, or video content.

(b) Billing and Collections.

- (i) Recorded Books will inform netLibrary promptly after completing each Subscription Sale and will submit all documentation necessary in order to establish Subscription Service for a Recipient that has purchased a Subscription from Recorded Books
- (ii) netLibrary will bill and collect for sales of Subscriptions by netLibrary or Recorded Books.
- (iii) Recorded Books will assist in collection efforts for libraries to whom Recorded Books has sold Subscriptions.

(c) Royalty Expense.

Form P&DA-05/02/03 (final)  
 AudioBook Production and Distribution Agreement  
 between netLibrary and Recorded Books - 09.10.04  
 (final/protected)/AudioBook-Production-and  
 Distribution-Agreement-between-netLibrary-and  
 Recorded-Books-09.10.04 (final/protected).doc

21 of 29

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- (i) Before either party collects revenue from the Sale of Subscriptions, netLibrary will calculate the Maximum Royalty Expense and the Net Subscription Price.
- (ii) The Maximum Royalty Expenses represents the Maximum amount of Royalties that may be accrued in connection with a Subscription. Maximum Royalty Expenses are calculated by multiplying the maximum number of checkouts associated with any particular Library Category by .25 cents per checkout.

**Table 2.2**

Library Category	List Subscription Price	Maximum Number of Check-Outs	Maximum Royalty Expense	Net Subscription Price
Category 1	\$3,000 per year	(up to 3,500 check-outs)	\$ 875.00	\$ 2,125.00
Category 2	\$6,000 per year	(up to 7,500 check-outs)	\$ 1,875.00	\$ 4,125.00
Category 3	\$12,000 per year	(up to 15,000 check-outs)	\$ 3,750.00	\$ 8,250.00
Category 4	\$30,000 per year	(up to 50,000 check-outs)	\$12,500.00	\$ 17,500.00
Category 5	\$60,000 per year	(up to 100,000 check-outs)	\$25,000.00	\$ 35,000.00

- (iii) The Net Subscription Price is calculated by subtracting the Maximum Royalty Expense from the List Subscription Price.

**(d) Calculation of Monthly Royalty Expense.**

- (i) netLibrary will calculate the Monthly Royalty Expense for each active Subscription by multiplying the total number of checkouts for each active Subscription during any given month by .25 cents per checkout.
- (ii) netLibrary will deduct the Monthly Royalty Expense for each active Subscription from the Maximum Royalty Expense for that Subscription and will calculate the total Monthly Royalty Expense by adding up the Monthly Royalty Expense for all active Subscription(s).
- (iii) netLibrary will include the total Monthly Royalty Expense in each monthly payment it makes to Recorded Books under Section 2.(f).
- (iv) Recorded Books will be solely responsible for all royalty, copyright, commissions, or other compensation payments due to the authors or owners of any right, title, or interest in or to the Publisher Products in connection with the sale of Subscriptions to Bundled Collections under this Agreement. This provision applies regardless of whether netLibrary or Recorded Books.
- (v) At the conclusion of each Subscription's annual Term, the parties have agreed to split any difference remaining after the total monthly Royalty Expense(s) that were paid during the Subscription's annual Term are subtracted from the Maximum Royalty Expense on the following basis:

Recorded Book's portion of any remaining difference	netLibrary's portion of any remaining difference
55%	45%

**(e) Allocation of Net Subscription Price.**

7B

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- (i) The allocation of the Net Subscription Price depends upon the type of market in which the Recipient that purchases the Subscription to the Bundled Location is located and the identity of the party that sold the Subscription to the Recipient.
- (ii) The portion of the Net Subscription Price that netLibrary and Recorded Books will receive will be calculated by multiplying the Net Subscription Price specified in Table 2.2 times the applicable percentages contained in the following table:

**Table 2.3**

Type of Market in which Recipient is Located	Recorded Book's portion of the List Price	netLibrary's portion of the List Price
Public	60%	40%
Academic	50%	50%
Primary and Secondary (K-12)	50%	50%
Special and Corporate	50%	50%
Other	50%	50%

(f) Payments by netLibrary to Recorded Books

- (i) netLibrary will remit payments to Recorded Books on a monthly basis within 45 days after the end of each month in which a library or other organization purchases a Subscription to a Bundled Collection. netLibrary's payment will cover the total Monthly Royalty Expense (as described in Section 2.(d) of this Exhibit C), the escrow split for those Subscriptions that expired during the month (as described in Section 2.(d)(v) of this Exhibit C), and Recorded Book's portion of the Net Subscription Price (as described in Section 2.(e) of this Exhibit C)
- (ii) Each party will send payments arising under this Agreement to the address set forth below.

	If to Recorded Books:	netLibrary
Name of contact:	Neil Tress	Anne Mueller
Organization:	Recorded Books LLC	netLibrary, a division of OCLC Online Computer Library Center, Inc.
Address:	270 Skipjack Road	4888 Pearl East Circle, Suite 103
Address:	Prince Frederick, MD 20678	Boulder, Colorado 80301
e-mail:	ntress@recordedbooks.com	AMueller@netLibrary.com
Telephone:	(410) 535-5590 ext. 1107 (800) 638-1304	(303) 381-8679
Fax:	(410) 535-2761	(303) 381-8996

9/6



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(g) Examples.

<b>Recorded Books Example:</b>	<b>OCLC Example</b>
Recorded Books sells a Subscription to Bundled Collection(s) to a Category 5 Public Library.	OCLC sells a Subscription to Bundled Collection(s) to a Category 3 Academic Library.
Recorded Books sends an Audio Book Library Agreement to the Library.	OCLC sends an Audio Book Library Agreement to the Library.
Library signs the Audio Book Library Agreement and sends it to Recorded Books.	Library signs the Audio Book Library Agreement and sends it to OCLC.
Recorded Books sends a Purchase Order for the Bundled Collection(s) and two executed originals of the Audio Book Library Agreement to netLibrary.	OCLC sends a Purchase Order for the Bundled Collection(s) and two executed originals of the Audio Book Library Agreement to netLibrary.
netLibrary fulfills the Purchase Order by activating the Subscription to the Bundled Collection(s) and bills the Library	netLibrary fulfills the Purchase Order by activating the Subscription to the Bundled Collection(s) and bills the Library
Library pays netLibrary \$60,000.	Library pays netLibrary \$12,000.
netLibrary calculates the net Subscription Price (\$35,000) by subtracting the Maximum Royalty Expense (\$25,000) from the Subscription Price (\$60,000).	netLibrary calculates the net Subscription Price (\$8,250) by subtracting the Maximum Royalty Expense (\$3,750) from the Subscription Price (\$12,000).
As specified in Table 2.3 of Section 2 of Exhibit C, netLibrary pays \$21,000 to Recorded Books and keeps \$14,000 for itself. The parties are individually responsible for determining how they recognize this revenue during the Term of the Subscription.	As specified in Table 2.3 of Section 2 of Exhibit C, netLibrary pays \$4,125 to Recorded Books and keeps \$4,125 for itself. The parties are individually responsible for determining how they recognize this revenue during the Term of the Subscription.
On a monthly basis, netLibrary pays Recorded Books .25¢ per check out as Royalty compensation to its Authors for Audio Books Checked Out during the Term of the Subscription. netLibrary subtracts the Monthly Subscription Expense from the Maximum Royalty Expense.	On a monthly basis, netLibrary pays Recorded Books .25¢ per check out as Royalty compensation to its Authors for Audio Books Checked Out during the Term of the Subscription. netLibrary subtracts the Monthly Subscription Expense from the Maximum Royalty Expense.
On a semi-annual basis, Recorded Books pays its Authors the .25¢ per check out received from netLibrary as Royalty compensation for Audio Books Checked Out during the Term of the Subscription.	On a semi-annual basis, Recorded Books pays its Authors the .25¢ per check out received from netLibrary as Royalty compensation for Audio Books Checked Out during the Term of the Subscription.
Assuming Library Patrons checked out 90,000 Audio Books during the term of the Subscription, the difference remaining after the total monthly Royalty Expense(s) that were paid during the Subscription's annual Term are subtracted from the Maximum Royalty Expense would be \$2,500 (\$25,000 - \$22,500). Since the parties have agreed to split equally any remaining difference, netLibrary would pay Recorded Books \$1,250 and would keep \$1,250 for itself.	Assuming Library Patrons checked out 10,000 Audio Books during the term of the Subscription, the difference remaining after the total monthly Royalty Expense(s) that were paid during the Subscription's annual Term are subtracted from the Maximum Royalty Expense would be \$1,250 (\$3,750 - \$2,500). Since the parties have agreed to split equally any remaining difference, netLibrary would pay Recorded Books \$625 and would keep \$625 for itself.

*AB*

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(h) Monthly Sales and Circulation Report(s)

- (i) netLibrary will make electronic versions of monthly sales by netLibrary available on netLibrary's Publisher Extranet within 10 days after the closing of the month. The Publisher Extranet is available at <http://www.netlibrary.com/extranet/Publisher/>.
- (ii) Recorded Books will email to netLibrary data in a mutually agreeable format and level of detail reflecting monthly sales by Recorded Books within 10 days after the closing of the month.
- (iii) netLibrary will also provide a Circulation Report within 10 days after the closing of the month. The Circulation Report will detail the following information:
  - (1) the total number of checkouts for each active Subscription during the month,
  - (2) the total number of checkouts for all active Subscription(s) during the month,
  - (3) the identity of each book checked out during the month, and
  - (4) the number of times that each book that was checked out during the month was checked out.

(i) Records and Examination.

- (i) netLibrary agrees to keep the records that are reasonably required to document payments due to Recorded Books under this Agreement. Recorded Books may have these books and records examined by an independent Certified Public Accountant of its choice at its expense. This right of examination will extend during the term of this Agreement and for ninety (90) days thereafter; provided this examination will be limited to the current and two (2) most recent past calendar years, and will not occur more than once in any twelve (12) month period. This examination will be carried out during normal business hours within a reasonable time after Recorded Books gives netLibrary written notice of its desire to conduct an examination.
- (ii) Recorded Books agrees to keep the records that are reasonably required to document royalty payments due to netLibrary under this Agreement. netLibrary may have these books and records examined by an independent Certified Public Accountant of its choice at its expense. This right of examination will extend during the term of this Agreement and for ninety (90) days thereafter; provided this examination will be limited to the current and two (2) most recent past calendar years, and will not occur more than once in any twelve (12) month period. This examination will be carried out during normal business hours within a reasonable time after netLibrary gives Recorded Books written notice of its desire to conduct an examination.
- (iii) If the independent Certified Public Accountant retained by Recorded Books requires a SAS 70 report on the financial processes and systems that are described in this Exhibit C, then Recorded Books will pay for the cost of preparing this report. netLibrary will use reasonable commercial efforts to facilitate the independent Certified Public Accountant's examination of the financial processes and systems and to cooperate with the independent Certified Public Accountant's preparation of the SAS 70 report.
- (j) Taxes. netLibrary will collect and remit to appropriate authorities all applicable sales, use, excise, withholding and other similar taxes arising from its performance under this Agreement and the sale of Subscriptions to Bundled Collections. Each party will complete and submit all tax forms and other paperwork required by or related to the other party's tax collection and remittance.
- (k) Recorded Books will be solely responsible for (i) all royalty, copyright, commissions, or other compensation payments due to the authors or owners of any right, title, or interest in or to the Publisher Products in connection with netLibrary's use of the same under this Agreement and (ii) any inaccuracies or errors in the Publisher Products delivered to netLibrary.



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**3. Promotions.**

- (a) Recorded Books grants netLibrary the rights to demonstrate the NL Electronic Version(s) of Publisher Products at conferences, trade shows and prospective customers; to preview up to 5 minutes or one track of the NL Electronic Version(s) of Publisher Products to prospective customers; to use up to three copies of each NL Electronic Version to provide access to prospective customers; and to use the names and logos of Recorded Books and the Publisher Products for promotional purposes. No royalties will be due for copies of the NL Electronic Version(s) used for these purposes.
- (b) netLibrary grants Recorded Books the rights to use the NL System to demonstrate the NL Electronic Version(s) of Publisher Products at conferences, trade shows and prospective customers; and to use the names and logos of netLibrary. No royalties will be due for using the NL System for these purposes.

**4. Title Commitment.**

- (a) Recorded Books will use its reasonable commercial efforts to submit at least 500 Publisher Products to netLibrary within 30 days of execution of this Agreement.
- (b) Recorded Books will submit at least 500 Publisher Products to netLibrary during each year in which the Exhibit is in effect.
  - (i) Recorded Books will submit at least 250 Publisher Products before December 15<sup>th</sup> of each year in which the Exhibit is in effect.
  - (ii) Recorded Books will submit at least an additional 250 Publisher Products before June 15<sup>th</sup> of each year in which the Exhibit is in effect.

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## Exhibit D – Library Audio Book Agreement

THIS LIBRARY AUDIO BOOK AGREEMENT (this "Agreement") is by and between \_\_\_\_\_, a \_\_\_\_\_ ("Library") and netLibrary, a division of OCLC Online Computer Library Center, Inc., an Ohio nonprofit corporation ("netLibrary").

WHEREAS, netLibrary has acquired certain rights to convert various books and other works to electronic format and to market and distribute the works as converted as Audio Books, and netLibrary operates an electronic library service for hosting and managing Audio Books and other materials over the Internet,

WHEREAS, Library desires to purchase licenses to certain Bundled Collections subject to the terms and conditions described in this Agreement,

IN CONSIDERATION OF THE MUTUAL COVENANTS AND OBLIGATIONS SET FORTH BELOW, the parties agree as follows.

### 1. DEFINITIONS; AUDIOBOOK LICENSES

A. **Definitions.** Terms defined within this Agreement have the respective meanings attributed to them throughout this Agreement or in this Section 1.A. Any defined term may be used in the singular and in the plural, as appropriate in the context.

1. "**Bundled Collection(s)**" means a collection of Audio Books that netLibrary and Recorded Books have agreed in writing to group together for Subscription sales.
2. "**Audio Books**" mean netLibrary's electronic versions of certain audiobooks and other works in which netLibrary has acquired certain rights.
3. "**Audio Book Services**" mean netLibrary's services related to Library's ongoing access to and use of Audio Books via the Internet, as further described in Exhibit A.
4. The "**Effective Date**" of this Agreement means the latest execution date set forth on the signature block below or the date on which Library or any Patron may first access Audio Books, whichever date occurs first.
5. "**Library's nL Website**" means the Website operated by netLibrary and open to Library and Patrons in order to access and use Audio Books licensed to Library.
6. A "**MARC Record**" means an electronic record containing metadata and other relevant information about the corresponding Audio Book.
7. "**nL Website**" means the Website operated by netLibrary and open to the general public in order to provide information about netLibrary's products and services.
8. "**Patrons**" mean Library's registered faculty, members, patrons, students, and other authorized users, including both onsite users and remote users.
9. A "**Subscription**" means an annual license for access to the Bundled Collection on the basis described in Exhibit B.
10. "**Subscription Price**" means the price established for the annual license for access to the Bundled Collection.
11. The "**Term**" of this Agreement commences on the Effective Date and continues in effect for one year. The Term will renew on each anniversary of the Effective Date for another year for as long as Library pays the Subscription Fee and netLibrary continues to provide this Service.

### B. Audio Book Licenses.

#### 1. Purchase of Licenses.

- a. **Audio Books.** During the Term of the Agreement, Library may select and purchase Subscriptions to Bundled Collection(s) in accordance with netLibrary's then current ordering practices. Each final order of Subscriptions to Bundled Collection(s) is incorporated in this Agreement by reference.
- b. **MARC Records.** netLibrary and Library agree that all MARC Records are the property of OCLC; Library may use MARC Records, if any, only for its own internal purposes as further described in Exhibit C.

2. **Copyrighted Works.** Library acknowledges and agrees that the copyright to each Audio Book is owned by or licensed to netLibrary, Recorded Books, and/or the respective publisher thereof. All Rights Reserved. By purchasing a Subscription to a Bundled Collection, Library obtains certain rights to access and use a copy of the Audio Book under this Agreement, but Library does not obtain or own any rights in the copyrights or any other intellectual property rights that may be associated with the Audio Book. Library agrees that any use of Audio Books by Library and its Patrons is governed by and will comply with applicable laws, including without limit U.S. copyright laws. Library acknowledges that it and its Patrons have no right to make copies of any Audio Book, or any portions thereof, except to the extent permitted by applicable copyright laws.

### II. AUDIOBOOK SERVICES

A. **Provision of Audio Book Services.** During the Term, netLibrary will establish, host, and administer Library's nL Website using netLibrary's existing electronic bookshelf technology and nL Website. Library and Patrons will access Library's Bundled Collection through Library's nL Website, and Library will receive Audio Book Services for Audio Books in the Bundled Collection. Library and Patrons will access Library's Audio Book collection and Audio Book Services via Library's Internet connection, which will be Library's expense and responsibility.

#### B. Library and Patron Usage.

1. **Limiting Access Measures.** Library will be solely responsible for determining which Patrons will have access to Library's nL Website under this Agreement. Library agrees to implement appropriate measures to limit the use of Audio Books through access by Patrons ("**Limiting Access Measures**") within a reasonable time frame. Limiting Access Measures may change from time to time and include, but are not limited to, remote patron authentication applications, authentication through protected IP addresses, a patterned identification check and privileged user accounts. netLibrary, in its sole discretion, may discontinue Library's access to Library's nL Website if Library fails to implement Limiting Access Measures within a reasonable timeframe. Except for standard fees charged by Library to Patrons, Library will not charge any Patron for use of Library's nL Website.
2. **Terms of Use.** The use of Library's nL Website by Library and Patrons will be governed by the "**Terms of Use**" currently available at <http://www.netlibrary.com/TermsOfUse.aspx>, as they may be amended from time to time, which are incorporated in this Agreement by reference. If a Library or a Patron violates the Terms of Use, netLibrary reserves the right, in its sole discretion, to suspend Library's or the Patron's access to and use of Library's nL Website. Library acknowledges and agrees that, in the case of repeated or persistent violations, netLibrary may terminate this Agreement.
3. **Tools.** Library will not use, implement or authorize use of any computerized or automated tool or application to search, index, test or otherwise obtain information from Library's nL Website.

### III. GENERAL PROVISIONS

#### A. Termination.

1. **Termination Without Cause.** Either party may terminate this Agreement without cause effective upon the conclusion of the then current Term, by giving the other party at least 60 days prior written notice of its intent to do so.
2. **Termination for Cause.** Either party may terminate this Agreement for cause at any time by providing the other party with prior written notice of the occurrence of any of the following events:
  - a. a party fails to timely pay any amounts due and payable, provided that the nonpayment is not cured within 10 days of the notice; or
  - b. a party breaches any material provision of this Agreement provided that the breach cannot be, or is not, cured within 60 days of the notice.



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3. **Survival.** All terms of this Agreement that are intended to survive termination for any reason of this Agreement will so survive, including without limit Section I, Paragraph B.2, Section II, Paragraph B and Section III, Paragraphs A.3, C, D, E, F, G, H, I.5 and I.13.

B. **Limited Warranty.** netLibrary warrants that netLibrary has the necessary authority to license the Audio Books to Library and, if applicable, to provide Audio Book Services to Library. netLibrary warrants that it will use its commercially reasonable efforts to provide Audio Book Services as described in this Agreement.

C. **Warranty Disclaimer.** EXCEPT AS EXPRESSLY PROVIDED IN SECTION III.C ABOVE, LIBRARY'S NL WEBSITE, AUDIOBOOK SERVICES, AND AUDIOBOOKS LICENSED UNDER THIS AGREEMENT ARE PROVIDED "AS IS" WITHOUT ANY WARRANTY OF ANY KIND AND NL AND ITS CONTENT PROVIDERS EXPRESSLY DISCLAIM ALL IMPLIED WARRANTIES, INCLUDING WITHOUT LIMIT THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE. NEITHER NL NOR ITS CONTENT PROVIDERS WARRANTS, GUARANTEES OR MAKES ANY REPRESENTATIONS REGARDING THE USE, OR THE RESULTS OF THE USE, OF LIBRARY'S NL WEBSITE OR AUDIOBOOKS. NO ORAL OR WRITTEN INFORMATION OR ADVICE GIVEN BY NL OR ITS EMPLOYEES WILL CREATE A REPRESENTATION OR WARRANTY OR IN ANY WAY INCREASE THE SCOPE OF NL'S OBLIGATIONS, AND LIBRARY MAY NOT RELY ON ANY SUCH INFORMATION OR ADVICE.

D. **Limitation on Liability.** Neither party will claim special, incidental, indirect, or consequential damages; including without limit lost profits, for breach of this Agreement. This limitation will also apply to any claims brought against netLibrary's content providers. Remedies are limited to claims for amounts due, for injunctive relief only as provided, or for direct damages. A party's aggregate liability for any and all claims, losses, liabilities, and demands arising, whether for breach of contract, in tort or otherwise, are limited to the total amount of Audio Book License Fees paid by Library to netLibrary, during the 12 month period immediately preceding the date on which the claim first arose.

E. **Payment Terms.** All fees and charges are due and payable 30 days from the date of the related invoice. netLibrary may deny Library and Patrons access to Library's NL Website until the unpaid invoice is paid in full.

F. **Other Provisions.**

1. **Entire Agreement.** All exhibits referred to in this Agreement are incorporated in this Agreement by reference. This Agreement sets forth the entire agreement between the parties with respect to the subject matter of the Agreement. This Agreement governs all orders for Audio Books and Audio Book Services placed by Library during the Term.

2. **Modification or Amendment.** Any modification or amendment of this Agreement must be in writing and signed by a duly authorized representative of each party. For clarification, no term contained in a purchase order or other similar document submitted to netLibrary by Library will be binding on the parties.

3. **Assignment.** Neither party may sell, assign, transfer or convey this Agreement or any rights and obligations without the prior written consent of the other party, which will not be unreasonably withheld. But, netLibrary may assign or transfer this Agreement to an affiliated company or to a third party that acquires substantially all of its assets upon written notice to the Library.

4. **Successors and Assigns.** This Agreement will be binding upon and inure to the benefit of the parties and their respective permitted successors and assigns.

5. **Governing Law, Jurisdiction and Venue.** [Deleted by Agreement of the Parties.]

6. **Severability.** If any provision of this Agreement proves to be illegal, invalid or unenforceable, the remainder of this Agreement will not be affected thereby, and in lieu of any provision of this Agreement that is illegal, invalid or unenforceable, there will be added as a part of this Agreement a provision as similar in terms to the illegal, invalid or unenforceable provision as may be possible to be legal, valid and enforceable.

7. **Further Assurances.** Library and netLibrary agree to take the further actions and to execute the further documents as may be

necessary or appropriate to effectuate this Agreement and the transactions contemplated in this Agreement.

8. **Force Majeure.** Neither party will be liable for, or have the right to terminate this Agreement as a result of, any delays or failures to perform any of its obligations under the Agreement to the extent that the delays or failures are due to circumstances beyond its reasonable control, including without limit acts of God; strikes; riots; acts of war; power failures; and functions or malfunctions of the Internet, telecommunications services, firewalls, encryption systems, and security devices; or governmental regulations imposed after the Effective Date.

9. **Waiver.** The waiver by either party of any right granted under this Agreement will not be deemed a waiver of any other right granted under this Agreement, or a precedent for any subsequent waiver.

10. **No Partnership.** As to one another the parties are considered independent contractors. This Agreement is not intended to create and will not be construed to create a partnership, joint venture, agency relationship, or other association.

11. **No Third Party Beneficiaries.** This Agreement is not intended to confer any benefit on any person or entity not a party to this Agreement.

12. **Notices.** Any notice, demand, request, consent, approval or other communication (collectively, "Notices") required or permitted to be given under this Agreement will be in writing and sent by hand delivery, special courier capable of confirming receipt, United States Mail (certified mail, return receipt requested), or facsimile or e-mail to a non-individual-specific e-mail address if receipt is confirmed. The parties acknowledge and agree that a Notice might not be deemed effective if receipt is not confirmed. Notices will be sent to the following addresses:

	If to nL:	If to Library:
	netLibrary, a division of OCLC Online Computer Library Center, Inc.	
Address:	4888 Pearl East Circle, Suite 103	
Address:	Boulder, Colorado 80301	
Attention:	Sales Management	
Telephone:	(303) 415-2548	
Facsimile:	(303) 381-8600	
e-mail address:	sales@netlibrary.com	

13. **Facsimile Copies.** A copy of the signed original of this Agreement transmitted by facsimile machine will be binding on both parties and have the same force and effect as the signed original.

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed by their duly authorized representatives, to be effective as of the Effective Date, as set forth below.

netLibrary: netLibrary, a division of OCLC Online Computer  
Library Center, Inc.

By: \_\_\_\_\_

Name: Richard L. Rosy

Title: OCLC Vice President, netLibrary

Date: \_\_\_\_\_

Library: \_\_\_\_\_

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

MB



This Agreement is a draft and is subject to change until it is fully executed.

Date: \_\_\_\_\_

**EXHIBIT A TO LIBRARY AUDIO BOOK AGREEMENT**  
**Audio Book Services**

1. **Existing Platform.** At the time this Agreement is executed, the nL Website and Library's nL Website are supported by netLibrary's existing electronic bookshelf technology, which includes a third party operating system, third party database management software, and proprietary netLibrary software.
2. **Delivery of Audio Book Services.** Payment of the Subscription Fee allows Library to access the Bundled Collection on Library's nL Website and receive Audio Book Services for such Audio Books for 1 year.
3. **Accessing Audio Books.** Subject to the terms of this Agreement, netLibrary will allow Library to access the Bundled Collection.
4. **Hosting of Audio Books.** netLibrary will host the Bundled Collection on Library's nL Website for as long as Library pays the Subscription Fee and netLibrary continues to provide this Service.
5. **Patron Access.** Library will implement and maintain Limiting Access Measures, based on netLibrary's standard systems, which will control Patrons' access to Library's nL Website.
6. **Reports.** Payment of the Subscription Fee entitles Library to the standard reports offered by netLibrary.

**EXHIBIT B TO LIBRARY AUDIO BOOK AGREEMENT**  
**Audio Book License Fees and Discounts**

1. Libraries are classified into 1 of 5 groups based on their circulation. netLibrary will charge Library a yearly institutional license fee based on this classification. The List Price(s) for a Subscription to the Bundled Collection for the first year of this Agreement are as follows:
 

Category 1: \$3,000 per year	(up to 3,500 check-outs)
Category 2: \$6,000 per year	(up to 7,500 check-outs)
Category 3: \$12,000 per year	(up to 15,000 check-outs)
Category 4: \$30,000 per year	(up to 50,000 check-outs)
Category 5: \$60,000 per year	(up to 100,000 check-outs)
2. The nL System will cap the maximum number of check-outs for a Library. The Patrons of a Library that purchases a Subscription to a Bundled Collection may check-out up to the number of Audio Books specified in the previous table for the Category of access purchased by the Library, but the nL System will not allow Patrons to check-out more than the applicable number of Audio Books specified in the previous table for the Category of access purchased by the Library.
3. If the Patrons of a Library that purchases a Subscription to a Bundled Collection check out the maximum number of Audio Books specified in the table above for the Category of access purchased by the Library, then the Library can upgrade its access by paying the incremental difference between 2 levels of access and receiving the incremental difference between the number of permitted check-outs for each level of access.

**EXHIBIT C TO LIBRARY AUDIO BOOK AGREEMENT**  
**Guidelines for the Use and Transfer of OCLC-Derived Records**  
**Revision of November 16, 1987**

**I. GUIDELINES**

(See Definitions in Part II below)

1. Each member and nonmember library may use records without restriction, and may transfer records of its own holdings without restriction to other libraries.
2. In addition to transfers to libraries, each member and nonmember library may transfer records of its own holdings without restriction, to (a) member networks, (b) state and multi-state library agencies and (c) all other noncommercial firms.
  - a. Member networks may produce and transfer to any member library, copies on magnetic tape of records used or inserted into the OCLC database by the library. Each member network also may process records of the holdings of any member or nonmember library which has employed and agreed to pay it for

that service, provided the member network has first signed either an individual agreement with the library, or a general agreement with OCLC, containing measures agreed upon by OCLC and the member network for protection of the records it has been employed to process. Any other use and transfer of records by member networks will be as provided in separate understandings with OCLC.

b. The use and transfer of records by library systems or projects operated by or under the aegis of one or more state or national library agencies will be as provided in separate understandings with OCLC. Such understandings may include (i) arrangements to incorporate state or national bibliographic databases into the OCLC system, (ii) paid-up licenses to use records in state or national programs (e.g., by means of payments for OCLC multi-institution tapes) and/or (iii) any other understandings that will facilitate state or national programs as well as the maintenance and enhancement of the OCLC database.

c. The use and transfer of records by any other organizations to which transfers are made under this Guideline 2 will be as provided in separate understandings with OCLC.

3. In addition, each member and nonmember library may transfer records of its own holdings to commercial firms which the library has employed and agreed to pay to process such records, provided that each commercial firm has first signed an individual agreement with the library, or OCLC has advised the library that the commercial firm has signed a general agreement with OCLC, in either case containing measures agreed upon by OCLC and the commercial firm for protection of the records it has been employed to process. In addition, each member and nonmember library may make any other transfers of records to commercial firms, subject to prior written agreements with OCLC. However, there is no requirement for prior written agreements (a) for transfers made under Guideline 1 above to libraries operated by commercial firms or (b) for transfers to commercial firms by former OCLC member libraries of records of their holdings, so long as the libraries maintain no continuing user status with OCLC.

4. When a nonmember organization makes bibliographic information available to OCLC which is subject to usage or transfer restrictions imposed by such nonmember organization, and OCLC nevertheless elects to accept the information for addition to the OCLC database, OCLC will notify libraries to which it makes the information available, and rights to use and transfer records based on such information will be subject to the same restrictions.

5. When transfers under Guideline 1 above are made to machine-readable union catalogs accessible by nonmember libraries, it is requested that machine-readable copies of the records of such union catalogs be submitted to OCLC. OCLC, at its own expense, will have the right to add such records to its database for all uses consistent with its chartered purposes.

6. The Guidelines above apply to all uses and transfers of records except where a mutually acceptable agreement establishing broader or narrower rights is made with OCLC relating to a specific product or service.

**II. DEFINITIONS**

1. The term "member library" means a general member of OCLC as defined in its Code of Regulations.

2. The term "nonmember library" means any library other than a member library.

3. A "member network" is an OCLC-affiliated regional, state or multi-state library network organization which is in contract with OCLC to provide OCLC services and products, or to assist OCLC to provide such services and products, to general members of OCLC.

4. A "commercial firm" is any organization permitted, under applicable law, to operate on a for-profit basis.

5. The term "records" means bibliographic records and holdings data (including copies thereof) derived from the OCLC database, including derivative works made from such records, and either received in machine-readable form or converted by the transferee into machine-readable form. The term also includes such records when held only in eye-readable form, in the case of proposed transfers to commercial firms. However, records do not include, as to any member or nonmember library (a) bibliographic records designated in the OCLC database as original cataloging by such member or nonmember library and (b) bibliographic records derived by such member or nonmember library from sources other than the OCLC database and to copies of which in the OCLC database its holdings symbol has been attached by tapeloading. Such excluded records are freely

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*This Agreement is a draft and is subject to change until it is fully executed.*

transferable and are not dealt with in these Guidelines. OCLC-derived records held only in eye-readable form are freely transferable except to commercial firms.

6. The terms "transfer" and "transfer of records" refer to all sales,

exchanges, gifts, sharing and other transfers, and all online access except online access provided to end-user patrons of a library in authorized possession of the record.

# **EXHIBIT 2**



Message

Page 1 of 1

**From:** Marge Gammon  
**Sent:** Thursday, February 03, 2005 5:08 PM  
**To:** Rich Rosy  
**Subject:** FW: FW: Introducing Downloadable Audiobooks from NetLibrary and Recorded BooksH

Well, he got the message. . . and he's clearly nervous about it.

-----Original Message-----

**From:** Marge Gammon  
**Sent:** Thursday, February 03, 2005 5:07 PM  
**To:** Brian Downing  
**Subject:** RE: FW: Introducing Downloadable Audiobooks from NetLibrary and Recorded BooksH

We should meet at our earliest convenience. Our strategy is, and has always been, to aggregate content of all types and all formats. We absolutely believe we're currently working with the best which is why we dropped our other initiatives last spring to pursue this agreement with you, but our charter dictates that we look at all possible opportunities and avenues for aggregating content. Because of the value we know you bring, we are anxious to first have discussions about any other publishers and any other audio content.

How does the 16th in Chicago look to you?  
Marge

-----Original Message-----

**From:** Downingbt@aol.com [mailto:Downingbt@aol.com]  
**Sent:** Thursday, February 03, 2005 1:32 PM  
**To:** Marge Gammon  
**Subject:** Fwd: FW: Introducing Downloadable Audiobooks from NetLibrary and Recorded BooksH

Hi Marge,

Before we go much further, perhaps we should have a strategy talk. I'm thinking about several things:

1. Audiobooks are much different than ebooks, where a main strategy is and should be to aggregate content. The chief issues with library wants with audio books are: a) quality b) being unabridged c) breadth of titles. We need to think about all those issues before we get content.
2. Talking with some publishers and making special deals needs to be handled delicately because of our \$.25 per click model with some agents and publishers. We don't want them aggravated because they think someone got a better deal.
3. One of the great reasons why we have a \$1.4 million business in 2 months + of selling is that it is all RB content. We don't want to water that down, or our profitability too much.

Just some thoughts to kick around...

Talk with you soon.

BD

Brian T. Downing  
Publisher  
Recorded Books, LLC  
270 Skipjack Road  
Prince Frederick, Maryland 20678  
phone (410)535-5590 ext. 1142  
fax (410)535-0257

Can't find me? Call Carla Evans (410)535-5590 ext. 1147

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# **EXHIBIT 3**



(3/30/2007) Doug Guthrie - Saint Pau

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Page 1

ORIGINAL

## LIBRARY AGREEMENT FOR AUDIO BOOK PURCHASES

This LIBRARY AGREEMENT FOR AUDIO BOOK PURCHASES (the "Agreement") is made between Saint Paul Public Library, a Minnesota nonprofit organization ("Library") and NetLibrary, a division of OCLC Online Computer Library Center, Inc., an Ohio nonprofit corporation ("NetLibrary").

Whereas, NetLibrary has acquired certain rights to convert various books and other works to electronic format and to market and distribute the works so converted as Audio Books, and NetLibrary operates an electronic library service for hosting and managing Audio Books and other materials over the Internet;

Whereas, Library desires to purchase licenses to certain Audio Books subject to the terms and conditions described in this Agreement;

IN CONSIDERATION OF THE MUTUAL COVENANTS AND OBLIGATIONS SET FORTH BELOW, the parties agree as follows:

## I. DEFINITIONS; AUDIO BOOK LICENSES

A. **Definitions.** Terms defined within this Agreement have the respective meanings attributed to them throughout this Agreement or in this Section I.A. Any defined term may be used in the singular and in the plural, as appropriate in the context.

1. "Audio Books" mean NetLibrary's electronic versions of certain Audio Books and other works in which NetLibrary has acquired certain rights.
2. The "Audio Books License" means a license to use the relevant Audio Book(s).
3. The "Audio Books License Fee" means a one-time-only fee for Library's license to use the relevant Audio Book(s) and is determined by subtracting the applicable Discount from the Audio Books List Price.
4. The "Audio Books List Price" means the price established by NetLibrary for the license to use the relevant Audio Book(s).
5. "Discount" means the percentage of the Audio Books License Fee. Discounts do not apply to Platform Services.
6. The "Effective Date" of this Agreement means the latest execution date set forth on the signature block below or the date on which Library or any Patron may first access Audio Books, whichever date occurs first.
7. "Library's NL Website" means the Website operated by NetLibrary and open to Library and Patrons in order to access and use Audio Books licensed to Library.
8. A "MARC Record" means an electronic record containing metadata and other relevant information about the corresponding Audio Book.
9. "NL Website" means the Website operated by NetLibrary and open to the general public in order to provide information about NetLibrary's products and services.
10. "Patrons" mean Library's registered faculty, members, patrons, students, and other authorized users, including both on-site users and remote users. Patrons are individuals and may not be corporations or other entities.
11. Subject to Section II.A below, the "Term" of this Agreement includes an "Initial Term," which commences on the Effective Date and continues in effect for one year, and any "Renewal Term(s)," which are automatic one year extensions of this Agreement that commence on each anniversary of the Effective Date unless this Agreement is terminated according to Section II.A.1 below.

## B. Audio Book Licenses

## 1. Purchase of Licenses

- a. **Audio Books.** During the Term of this Agreement, Library may select and purchase Audio Book Licenses in accordance with NetLibrary's then current ordering practices. NetLibrary will make the Audio Books Licenses available to Library according to NetLibrary's agreements with its content providers and partners. Each final order of Audio Book Licenses is incorporated in this Agreement by reference.

- b. **MARC Records.** As part of the relevant Platform Fee, NetLibrary will provide Library with one copy of the MARC Record that corresponds to each Audio Book License purchased by Library. NetLibrary and Library agree that all MARC Records are the property of OCLC; Library may use MARC Records only for its own internal purposes as further described in Exhibit B. NetLibrary will replace defective MARC Records if Library notifies NetLibrary of the defect within 30 days of NetLibrary's delivery of the MARC Record and NetLibrary concurs that the MARC Record is defective.

2. **Copyrighted Works.** Library acknowledges and agrees that the copyright to each Audio Book is owned by or licensed to NetLibrary and the respective publisher thereof. All Rights Reserved. By purchasing a license to an Audio Book, Library obtains certain rights to access and use a copy of the Audio Book under this Agreement, but Library does not obtain or own any rights in the copyright or any other intellectual property rights that may be associated with the Audio Book. Library agrees that it is responsible for all use of Audio Books by Library and its Patrons, and that any use of Audio Books by Library and its Patrons is governed by and will comply with applicable laws, including without limit U.S. copyright laws. Library acknowledges that it and its Patrons have no right to make copies of any Audio Book, or any portions thereof, except to the extent permitted by applicable copyright laws.

## II. GENERAL PROVISIONS

## A. Termination

1. **Termination Without Cause.** Either party may terminate this Agreement without cause effective upon the conclusion of the then current Initial Term or Renewal Term, as applicable, by providing the other party with at least 60 days prior written notice of its intent to do so.
2. **Termination for Cause.** Either party may terminate this Agreement for cause at any time by providing the other party with prior written notice of the occurrence of any of the following events:
  - a. a party fails to timely pay any amounts due and payable, provided that the nonpayment is not cured within 10 days of the notice; or
  - b. a party violates any material provision of this Agreement, including without limit a material failure to provide required services, a breach by Library or Patrons of copyright laws, failure to comply with any security documents, or a breach of the confidentiality provisions of this Agreement, or otherwise has committed breaches of this Agreement that, in the aggregate, are material, provided that the breach(es) cannot be, or is/are not, cured within 30 days of the notice.
3. **Survival.** All terms of this Agreement that are intended to survive termination for any reason of this Agreement will survive, including without limit Section I.B.2; Section(s) II.B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S, T, U, V, W, X, Y, Z, and Section D of Exhibit A.
4. **Limited Warranty.** NetLibrary warrants that, as to any Audio Books licensed to Library under this Agreement, NetLibrary has the necessary authority to license the Audio Books to Library and to provide Platform Services to Library. NetLibrary warrants that it will use its commercially reasonable efforts to provide Platform Services as described in this Agreement.

C. **Warranty Disclaimer.** EXCEPT AS EXPRESSLY PROVIDED IN SECTION II.B ABOVE, LIBRARY'S NL WEBSITE, PLATFORM SERVICES, AND AUDIO BOOKS LICENSED UNDER THIS AGREEMENT ARE PROVIDED "AS IS" WITHOUT ANY WARRANTY OF ANY KIND AND NETLIBRARY AND ITS CONTENT PROVIDERS EXPRESSLY DISCLAIM ALL IMPLIED WARRANTIES, INCLUDING WITHOUT LIMIT THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE. NEITHER NETLIBRARY NOR ITS CONTENT PROVIDERS WARRANTS, GUARANTEES, OR MAKES ANY REPRESENTATIONS REGARDING THE USE OR THE RESULTS OF THE USE, OF LIBRARY'S NL WEBSITE OR

Form Library Audio Book Purchase Agreement (04/01) - 02.01.07  
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1 of 6

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Page 2

AUDIO BOOKS, NO ORAL OR WRITTEN INFORMATION OR ADVICE GIVEN BY NETLIBRARY OR ITS EMPLOYEES WILL CREATE A REPRESENTATION OR WARRANTY OR IN ANY WAY INCREASE THE SCOPE OF NETLIBRARY'S OBLIGATIONS, AND LIBRARY MAY NOT RELY ON ANY SUCH INFORMATION OR ADVICE.

**D. Indemnity.** NetLibrary will defend, indemnify, and hold Library harmless from any action based solely on a claim that Audio Books furnished and used within the scope of this Agreement infringe any copyright of any third party, except that this indemnity will not apply to copyright claims arising from content that has been provided to NetLibrary by publishers and is provided by NetLibrary without substantive modification (except for conversion to digital format). Library will defend, indemnify, and hold NetLibrary harmless from any action based on a claim that the use by Library or its Patrons of Library's NL Website or Audio Books in violation of the terms of this Agreement infringes any copyright or trade secrets of any third party.

**E. Limitation on Liability.** Neither party will claim special, incidental, indirect, or consequential damages, including without limitation profits, for breach of this Agreement. This limitation will also apply to any claims brought against NetLibrary's content providers. Remedies are limited to claims for amounts due, for injunctive relief only as provided, or for direct damages. A party's aggregate liability for any and all claims, losses, liabilities, and demands arising, whether for breach of contract, in tort or otherwise, are limited to the total amount of Audio Book License Fees, and Platform Fees (collectively, "Fees") paid by Library to NetLibrary, during the 12 month period immediately preceding the date on which the claim first arose. Notwithstanding any other provision of this Agreement, the nonbreaching party may seek injunctive relief in any court of competent jurisdiction to do any act or prevent any breaching party from continuing to do any act or commit any violation or threatened violation of this Agreement, and the prevailing party, if any, on a claim for injunctive relief is entitled to recover its reasonable attorney fees incurred in connection with that proceeding. Injunctive relief will be without prejudice to the nonbreaching party's right to also seek money damages for breach of this Agreement.

**F. Confidential Information.** To the extent allowed by applicable law, Library agrees that it will not use or disclose information relating to (i) the terms of this Agreement, (ii) the content of reports delivered under this Agreement, (iii) pricing terms and other business arrangements governed by this Agreement and (iv) any other documents provided by NetLibrary that have a confidential, proprietary or other similar designation or should reasonably be believed to be the confidential or proprietary information of NetLibrary or its content providers. Notwithstanding the foregoing, Library may disclose the aggregated content of reports delivered under EXAC.A to other library professionals.

**G. Payment Terms.** All fees and charges are due and payable 30 days from the date of the related invoice. NetLibrary has the right to charge 1.5% interest per month on any invoice that remains unpaid longer than 30 days from the date of the invoice; in addition, NetLibrary may deny Library and Patrons access to Library's NL Website until the unpaid invoice is paid in full.

#### H. Other Provisions.

**1. Entire Agreement.** All exhibits referred to in this Agreement are incorporated in this Agreement by reference. Any modification or amendment to Section(s) B. and C of Exhibit A under Section 3.1.2 below will also be incorporated in this Agreement by reference. This Agreement sets forth the entire agreement between the parties with respect to the subject matter of the Agreement, merges all discussions between them and supercedes and replaces any and every other prior or contemporaneous agreement, understanding or negotiation that may have existed between NetLibrary and Library to the extent that any such agreement relates to the subject matter of the Agreement. This Agreement governs all orders for Audio Books and Platform Services placed by Library during the Term.

**2. Modification or Amendment.** Notwithstanding any other provision in this Agreement, NetLibrary will have the right to modify and

amend Sections B. and C of Exhibit A to this Agreement provided that NetLibrary provide Library with at least 30 days prior written notice, and, in this event, the modified or amended Exhibit(s) will not be effective before the end of the 30-day notice period. Any other modification or amendment of this Agreement must be in writing and signed by a duly authorized representative of each party. For clarification, no term contained in a purchase order or other similar document submitted to NetLibrary by Library will become binding on the parties unless and until the term is mutually agreed upon in a written modification or amendment to this Agreement as described above.

**3. Assignment.** Neither party may sell, assign, transfer or convey this Agreement or any rights and obligations without the prior written consent of the other party, which will not be unreasonably withheld. Notwithstanding the foregoing, NetLibrary reserves the right to assign or transfer this Agreement to an affiliated company or to a third party that acquires substantially all of its assets upon written notice to the Library.

**4. Successors and Assigns.** This Agreement will be binding upon and inure to the benefit of the parties and their respective permitted successors and assigns.

**5. Governing Law, Jurisdiction and Venue.** This Agreement will be governed by the laws of the State of Colorado, U.S.A. without regard to any conflict of laws provisions contained in this Agreement. NetLibrary and Library agree that any action arising from or out of the negotiations, execution, interpretation or enforcement of this Agreement may be brought in the state or federal courts located in the State of Colorado, U.S.A. Library hereby consents to jurisdiction and venue in the state and federal courts in Colorado, U.S.A.

**6. Interpretation.** The use of headings in this Agreement is solely for the mutual convenience of the parties and will not affect the construction.

**7. Severability.** If any provision of this Agreement proves to be illegal, invalid or unenforceable, the remainder of this Agreement will not be affected thereby, and in lieu of any provision of this Agreement that is illegal, invalid or unenforceable, there will be added as a part of this Agreement a provision as similar in form to the illegal, invalid or unenforceable provision as may be possible to be legal, valid and enforceable.

**8. Further Assurances.** Library and NetLibrary agree to take the further actions and to execute the further documents as may be necessary or appropriate to effectuate this Agreement and the transactions contemplated in this Agreement.

**9. Force Majeure.** Library acknowledges that the Internet is an unsecured, unstable, unregulated, unorganized and unreliable environment, and that the ability of NetLibrary to deliver Platform Services may depend upon the Internet and equipment, software, systems, data and services provided by various telecommunications carriers, equipment manufacturers, firewall providers, encryption system developers and other vendors and third parties. Neither party will be liable for, or have the right to terminate this Agreement as a result of, any delays or failures to perform any of its obligations under the Agreement to the extent that the delays or failures are due to circumstances beyond its reasonable control, including without limitation acts of God, strikes, riots, acts of war, power failures, and functional or malfunctions of the Internet, telecommunications services, firewalls, encryption systems, and security devices; or governmental regulations imposed after the Effective Date.

**10. Waiver.** The waiver by either party of any right granted under this Agreement will not be deemed a waiver of any other right granted under this Agreement, or a precedent for any subsequent waiver.

**11. No Partnership.** As to one another the parties are considered independent contractors. It is not the intention of the parties to create, nor will this Agreement be construed as creating, a partnership, joint venture, agency relationship, or other association, or render the parties liable as partners, co-venturers, agents, or principals.

From Library Audio Book Purchase Agreement (Form) - 02.01.07  
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2 of 8

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Page 3

12. **Third Party Beneficiaries.** This Agreement is not intended to confer any benefit on any person or entity not a party to this Agreement.

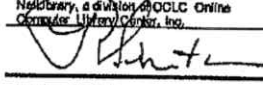
13. **Notice.** Any notice, demand, request, consent, approval or other communication (collectively, "Notice") required or permitted to be given under this Agreement will be in writing and sent by hand delivery, special courier capable of confirming receipt, United States Mail (certified mail, return receipt requested), or facsimile or e-mail to a non-individual-specific e-mail address if receipt is confirmed. The parties acknowledge and agree that a Notice might not be deemed effective if receipt is not confirmed. Notices will be deemed given under the following rules: if hand delivered, at the time of delivery; if sent by special courier, on the third day after delivery to the courier; if mailed, on the seventh day after deposit in the United States Mail; and if sent by facsimile or e-mail to a non-individual-specific e-mail address, on the date transmitted if the sender receives confirmation that the transmission was received during the notified party's normal business hours, otherwise on the notified party's next normal business day. Notices will be sent to the following addresses:

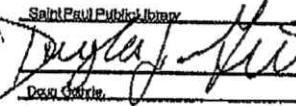
	to NL	to Library
	NetLibrary, a division of OCLC Online Computer Library Center, Inc.	Saint Paul Public Library
Address:	4888 Pearl East Circle, Suite 403	Materials Mgt Section, 2109 Wash Ave.
Address:	Boulder, Colorado 80301	St Paul, MN 55119
Attention:	Sales Management	Manager
Telephone:	(303) 415-2540	651.501.6311
Facsimile:	(303) 581-8000	651-501-6339

e-mail address: sales@netlibrary.com jim.wogit@stpaullib.mn.us

14. **Facsimile Copies.** A copy of the signed original of this Agreement transmitted by facsimile machine will be binding on both parties and have the same force and effect as the signed original.

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed by their duly authorized representatives, to be effective as of the Effective Date, as set forth below.

NetLibrary: NetLibrary, a division of OCLC Online  
Computer Library Center, Inc.  
By:   
Name: Rick Schindler  
Title: Vice President and Chief Financial Officer  
Date: 5-1-2007

Library: Saint Paul Public Library  
By:   
Name: Doug Guthrie  
Title: Manager, Materials Management Center  
Date: 4-13-07

## EXHIBIT A TO LIBRARY AUDIO BOOKS AGREEMENT - PLATFORM FEE

## A. Definitions.

1. "Platform Fee" means the fee Library pays to maintain Library's NL Website and to maintain and upgrade the Existing Platform and bandwidth. Platform Fees include Platform Services. Library may pay the Platform Fee on the basis described in this Exhibit A.
2. "Platform Services" mean NetLibrary's services related to Library's ongoing access to and use of Audio Books or Subscription(s) to Audio Books via the Internet and Library's NL Website, as further described in this Exhibit A.
3. The "Reinstatement Fee" means the fee associated with reinstating Platform Services for an Audio Book for which Platform Services were previously terminated, as further described in this Exhibit A.

## B. Annual Platform Fee.

1. The Annual Platform Fee for an order will equal 10% of the Audio Book List Price(s) for all the Audio Book(s) in the order at the time of initial licensing.
2. Upon payment of an Annual Platform Fee, NetLibrary will host and provide Platform Services for the effected Audio Books for 1 year from the purchase date.
3. The first payment of the Annual Platform Fee for an order will be due and payable at the time the Library purchases the Audio Book License(s), and will be included on the invoice for the corresponding Audio Book License Fee(s).
4. NetLibrary will calculate and invoice Annual Platform Fees for the second and subsequent years on an annualized basis on a single date each year.
5. The Reinstatement Fee for an Audio Book will equal 10% of the Audio Book List Price.

6. The Annual Platform Fee in the second and subsequent years will be reduced by the portion of the first year Annual Platform Fee attributable to any Audio Book removed from, and not reinstated to, Library's Audio Book collection as further described in this Exhibit.

7. If NetLibrary elects not to continue to support the Existing Platform at any time due to technological obsolescence or cessation of third party vendor support, NetLibrary may charge Library (if Library selected the Annual Platform Fee option) additional fees for migrating the Audio Books for which Library is paying the Annual Platform Fee to a replacement platform, subject to any applicable limitations as set out on Exhibit A.

## C. Platform Services

## 1. Provision and Delivery of Platform Services

- a. If Library has paid the Platform Fee then, subject to the terms of this Agreement, Library will receive Platform Services.
- b. Platform Services include:
  - i. establishing and administering Library's NL Website,
  - ii. hosting the Audio Books or Audio Books Collection, as applicable, on Library's NL Website, and
  - iii. providing access - to Library and Patrons - to Library's Audio Books or Audio Books Collection, as applicable, through Library's NL Website.
- c. Library and Patrons will access Platform Services via Library's Internet connection, which will be Library's expense and responsibility.
- d. NetLibrary will provide Platform Services for as long as Library continues to pay the Platform Fee. NetLibrary continues to support the Existing Platform, and Library has not notified NetLibrary to remove the Audio Books from Library's NL

(3/30/2007) Doug Guthrie - Saint Paul P c Library - 3.29.07.pdf

Page 41

Website.

**c. Removing and Reinstating Audio Books.**

- i. Library may elect to have any Audio Books removed from Library's NL Website, by providing NetLibrary with written notice of the election within 60 days of the annualized date on which Platform Fees are calculated and invoiced.
- ii. Library may elect to have any Audio Books reinstated to Library's NL Website, by providing NetLibrary with written notice of the election within 60 days of the annualized date on which Platform Fees are calculated and invoiced and by paying the applicable Reinstatement Fee as further described in Exhibit A. Platform Fees for reinstated Audio Books are due and payable on the reinstatement date.
- f. Notwithstanding any other provision of this Agreement, if NetLibrary terminates this Agreement for cause under Section 11.A.2. of this Agreement, then NetLibrary's obligation to provide Audio Books and Platform Services will expire.

**2. Support for NL Website and Library's NL Website.**

- a. **Existing Platform.** At the time this Agreement is executed, the NL Website and Library's NL Website are supported by NetLibrary's existing electronic bookshelf technology, which includes a third party operating system, third party database management software, and proprietary NetLibrary software (collectively, the "Existing Platform"). NetLibrary will charge any fees to continue to support the operation of the Existing Platform, except as may be provided in this Agreement.
- b. **Platform Commitment Date.** Initially, the "Platform Commitment" Date will be July 1, 2012. However, NetLibrary may publish or announce a specific date as the Platform Commitment Date or a change in the process of determining the Platform Commitment Date, provided that the publication or announcement will only be applicable to purchases of Audio Books licenses made after the date of the publication or announcement.
- c. **Migration.** If the Existing Platform becomes technologically obsolete and/or third party vendors cease to support third party components of the Existing Platform before the Platform Commitment Date, then, except as may be provided in this Agreement, NetLibrary will not charge Library any additional fees to support the Existing Platform until the Platform Commitment Date. On or to migrate Library's Audio Books content to a replacement platform before the Platform Commitment Date. If the Existing Platform becomes technologically obsolete and/or third party vendors cease to support third party components of the Existing Platform after the Platform Commitment Date, then NetLibrary may charge fees to support a replacement platform or to migrate Library's Audio Books to a replacement platform.

**3. Patron Access.**

Library will implement and maintain Limiting Access Measures, based on NetLibrary's standard systems, which will control Patrons' access to Library's NL Website.

**4. Reports.**

Payment of the Platform Fees entitles Library to the standard reports offered by NetLibrary. These reports may be modified by NetLibrary from time to time and may include without limit current account schedule, transaction history, owned Audio Books,

popular Audio Books, Audio Books not owned, all Audio Books, new Audio Books, activity by subject area and activity by title. Nonstandard reports may be developed for sites on a case-by-case basis.

**D. Library and Patron Usage.**

1. **Limiting Access Measures.** Library will be solely responsible for determining which Patrons will have access to Library's NL Website under this Agreement. Library agrees to implement appropriate measures to limit the use of Audio Books through access by Patrons ("Limiting Access Measures"). Limiting Access Measures are to comply with NetLibrary's reasonable application requirements which may change from time to time and may include, but are not limited to, remote patron authentication applications, authentication through protected IP addresses, a patented identification check and privileged user accounts. NetLibrary will consider other Limiting Access Measures on a case-by-case basis, but may reject the proposed methods if, in NetLibrary's opinion, access will not be sufficiently controlled. Library agrees to implement Limiting Access Measures within a reasonable time frame. NetLibrary, in its sole discretion, may discontinue Library's access to Library's NL Website if Library fails to implement Limiting Access Measures within a reasonable timeframe. Except for standard fees charged by Library to Patrons, Library will not charge any Patron for use of Library's NL Website.

2. **Terms of Use.** The use of Library's NL Website by Library and Patrons will be governed by the "Terms of Use" currently available at <http://www.netlibrary.com/terms2.html>, as they may be amended from time to time, which are incorporated in this Agreement by reference. If a Library or a Patron violates the Terms of Use, NetLibrary reserves the right, in its sole discretion, to suspend or terminate Library's or the Patron's access to and use of Library's NL Website. At its sole option, NetLibrary may notify Library of any violation by a Patron of the Terms of Use, and in the event, also at its sole option, NetLibrary may grant Library three days to attempt to correct the violation by a Patron and NetLibrary will not terminate the Patron's access to and use of Library's NL Website if the violation is corrected within the three day period. Library acknowledges and agrees that, in the case of repeated or persistent violations, NetLibrary may not provide the aforementioned notice and correction period to Library. Repeated or persistent violations of the Terms of Use by Library or Patrons may be cause for termination of this Agreement by NetLibrary.

3. **Tools.** Library will not use, implement or authorize use of any computerized or automated tool or application to search, index, list or otherwise obtain information from Library's NL Website, including without limit any "spidering" or web crawler application (collectively, "Tools"), without obtaining the prior written approval of NetLibrary. NetLibrary will not unreasonably withhold this approval, provided that the proposed use of Tools does not (i) present a risk of interfering with use of NL Website by Patrons or other NetLibrary end-users; (ii) degrade or impair the performance of NL Website; (iii) cause NetLibrary to violate its agreements with its other end-users, its publishers or other third parties; or (iv) constitute a violation of applicable law, including without limit U.S. copyright law. Library acknowledges and agrees that NetLibrary may from time to time implement controls on Library's NL Website to regulate or restrict the use of Tools.



(3/30/2007) Doug Guthrie - Saint Paul Public Library - 3.29.07.pdf

Page 5

EXHIBIT B TO LIBRARY AUDIO BOOKS AGREEMENT - GUIDELINES FOR THE USE AND TRANSFER OF OCLC-DERIVED RECORDS  
REVISION OF NOVEMBER 16, 1987

## I. GUIDELINES

(See Definitions in Part II below)

1. Each member and nonmember library may use records without restriction, and may transfer records of its own holdings without restriction to other libraries.
2. In addition to transfers to libraries, each member and nonmember library may transfer records of its own holdings without restriction, to
  - (a) member networks, (b) state and multi-state library agencies and (c) all other noncommercial firms.
3. Member networks may produce and transfer to any member library, copies on magnetic tape of records used or inserted into the OCLC database by the library. Each member network also may process records of the holdings of any member or nonmember library which has employed and agreed to pay it for that service, provided the member network has first signed either an individual agreement with the library, or a general agreement with OCLC, containing measures agreed upon by OCLC and the member network for protection of the records it has been employed to process. Any other use and transfer of records by member networks will be as provided in separate understandings with OCLC.
4. The use and transfer of records by library systems or projects operated by or under the aegis of one or more state or national library agencies will be as provided in separate understandings with OCLC. Such understandings may include (i) arrangements to incorporate state or national bibliographic databases into the OCLC system, (ii) paid-up licenses to use records in state or national programs (e.g., by means of payments for OCLC multi-institution tapes) and/or (iii) any other understandings that will facilitate state or national programs as well as the maintenance and enhancement of the OCLC database.
5. The use and transfer of records by any other organizations to which transfers are made under this Guideline 2 will be as provided in separate understandings with OCLC.
6. In addition, each member and nonmember library may transfer records of its own holdings to commercial firms which the library has employed and agreed to pay to process such records, provided that each commercial firm has first signed an individual agreement with the library, or OCLC has advised the library that the commercial firm has signed a general agreement with OCLC, in either case containing measures agreed upon by OCLC and the commercial firm for protection of the records it has been employed to process. In addition, each member and nonmember library may make any other transfers of records to commercial firms, subject to prior written agreements with OCLC. However, there is no requirement for prior written agreements (a) for transfers made under Guideline 1 above to libraries operated by commercial firms or (b) for transfers to commercial firms by former OCLC member libraries of records of their holdings, so long as the libraries maintain no continuing user status with OCLC.
7. When a nonmember organization makes bibliographic information available to OCLC which is subject to usage or transfer restrictions imposed by such nonmember organization, and OCLC nevertheless elects to accept the information for addition to the OCLC database, OCLC will notify libraries to which it makes the information available, and rights to use and transfer records based on such information will be subject to the same restrictions.
8. When transfers under Guideline 1 above are made to machine-readable union catalogs accessible by nonmember libraries, it is requested that machine-readable copies of the records of such union catalogs be submitted to OCLC. OCLC, at its own expense, will have the right to add such records to its database for all uses consistent with its chartered purposes.
9. The Guidelines above apply to all uses and transfers of records except where a mutually acceptable agreement establishing broader or narrower rights is made with OCLC relating to a specific product or service.

## II. DEFINITIONS

1. The term "member library" means a general member of OCLC as defined in its Code of Regulations.
2. The term "nonmember library" means any library other than a member library.
3. A "member network" is an OCLC-affiliated regional, state or multi-state library network organization which is in contract with OCLC to provide OCLC services and products, or to assist OCLC to provide such services and products, to general members of OCLC.
4. A "commercial firm" is any organization permitted, under applicable law, to operate on a for-profit basis.
5. The term "records" means bibliographic records and holdings data (including copies thereof) derived from the OCLC database, including derivative works made from such records, and either received in machine-readable form or converted by the transferee into machine-readable form. The term also includes such records when held only in eye-readable form, in the case of proposed transfers to commercial firms. However, records do not include, as to any member or nonmember library (a) bibliographic records designated in the OCLC database as original cataloging by such member or nonmember library and (b) bibliographic records derived by such member or nonmember library from sources other than the OCLC database and to copies of which in the OCLC database its holdings symbol has been attached by tape-loading. Such excluded records are freely transferable and are not dealt with in these Guidelines. OCLC-derived records held only in eye-readable form are freely transferable except to commercial firms.
6. The terms "transfer" and "transfer of records" refer to all sales, exchanges, gifts, sharing and other transfers, and all online access except online access provided to end-user patrons of a library in authorized possession of the records.

# **EXHIBIT 4**



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PAGE 02

## CONSORTIUM AGREEMENT FOR AUDIO BOOK PURCHASES

ORIGINAL

Consortium Agreement for Audio Book Purchases	1
I. DEFINITIONS; AUDIO BOOK LICENSES	1
A. Definitions	1
B. Audio Book License	1
II. GENERAL PROVISIONS	2
A. Termination	2
B. Limited Warranty	2
C. Warranty Disclaimer	2
D. Indemnity	3
E. Limitation on Liability	3
F. Confidential Information	3
G. Payment Terms	3
H. Other Provisions	3
Exhibit A to Consortium Agreement for Audio Book Purchases - Platform Fee	3
A. Definitions	4
B. Annual Platform Fee	4
C. Platform Services	4
D. Consortium and Patron Usage	5
Exhibit B to Consortium Agreement for Audio Book Purchases - Guidelines for the Use and Transfer of OCLC-Derived Records	5
Exhibit C to Consortium Agreement for Audio Book Purchases	7
Exhibit D to Consortium Agreement for Audio Book Purchases - Library Audio Book Agreement	8
I. DEFINITIONS; AUDIO BOOK LICENSES	10
A. Definitions	10
B. Audio Book License	10
II. GENERAL PROVISIONS	11
A. Termination	11
B. Limited Warranty	11
C. Warranty Disclaimer	11
D. Indemnity	11
E. Limitation on Liability	11
F. Confidential Information	12
G. Payment Terms	12
H. Other Provisions	12
Exhibit A to Library Agreement for Audio Book Purchases - Platform Fee	12
A. Definitions	13
B. Annual Platform Fee	13
C. Platform Services	13
D. Member and Patron Usage	13
Exhibit B to Library Agreement for Audio Book Purchases - Guidelines for the Use and Transfer of OCLC-Derived Records	14
	16

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed by their duly authorized representatives, to be effective as of the Effective Date, as set forth below.

Consortium: BIBLIOGRAPHICAL CENTER FOR RESEARCH (BCR)

By: Brandi K. Bailey-Hainer

Name: Brandi BAILEY-HAINER

Title: Director

Date: 5/1/07

NetLibrary: NetLibrary, a division of OCLC Online Computer Library Center, Inc.

By: Rick Schwilke

Name: Rick Schwilke

Title: Vice President and Chief Financial Officer

Date: 5-1-07

THIS CONSORTIUM AGREEMENT FOR AUDIO BOOK PURCHASES (the "Agreement") is by and between BIBLIOGRAPHICAL CENTER FOR RESEARCH, a nonprofit organization formed under the laws of Colorado ("Consortium") and NetLibrary, a division of OCLC Online Computer Library Center, Inc., an Ohio nonprofit corporation ("NetLibrary").

WHEREAS, NetLibrary has acquired certain rights to convert various books and other works to electronic format and to market and distribute the works as converted as Audio Books, and NetLibrary operates an electronic library service for hosting and managing Audio Books and other materials over the Internet;

WHEREAS, Consortium desires to purchase licenses to certain Audio Books, as part of one or more Shared Collections, subject to the terms and conditions described in this Agreement;

WHEREAS, Consortium desires to market Audio Books and Audio Book Services to and for its Members;

IN CONSIDERATION OF THE MUTUAL COVENANTS AND OBLIGATIONS SET FORTH BELOW, the parties agree as follows:

## I. DEFINITIONS; AUDIO BOOK LICENSES

## A. Definitions

Terms defined within this Agreement have the respective meanings attributed to them throughout this Agreement or in this Section I.A.

Form Consortium Audio Book Purchase Agreement (Doc# - 020107)  
BCR Consortium Audio Book Purchase Agreement - 5.22.07.1

1 of 15

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Any defined term may be used in the singular and in the plural, as appropriate in the context.

1. "Audio Books" mean NetLibrary's electronic versions of certain Audio Books and other works in which NetLibrary has acquired certain rights.
2. The "Audio Books License" means a license to use the relevant Audio Books(s).
3. The "Audio Books License Fee" means a one-time-only fee for Consortium's license to use the relevant Audio Books(s) and is determined by subtracting the applicable Discount from the Audio Books List Price.
4. The "Audio Books List Price" means the price established by NetLibrary for the license to use the relevant Audio Books(s).
5. "Consortium's NL Website" means the Website account operated by NetLibrary and open to Consortium, Members and Patrons in order to access and utilize the Shared Collection.
6. "Discount" means the percentage of the Audio Books List Price used in determining the Audio Books License Fee. Discounts do not apply to Platform Services.
7. The "Effective Date" of this Agreement means the latest execution date set forth on the signature block below or the date on which Consortium, any Member or any Patron may first access Audio Books, whichever date occurs first.
8. "Consortium's NL Website" means the Website operated by NetLibrary and open to Consortium, Members, and Patrons in order to access and use Audio Books licensed to Consortium.
9. A "MARC Record" means an electronic record containing metadata and other relevant information about the corresponding Audio Book.
10. The "Library Audio Book Agreement" refers to the "Audio Book Agreement for a Member of the BCR Consortium" and means an agreement by and between NetLibrary and a Member governing such Member's access to the Shared Collection(s), and the Member's purchase of Audio Book Licenses and related Audio Book Services for a Unique Collection. An example of the Member Audio Book Agreement is attached as Exhibit D. The Member Audio Book Agreement is subject to change from time to time by NetLibrary.
11. "Members" means the permitted member library organizations that Consortium has authorized to access the Shared Collection or Unique Collection by giving NetLibrary written notice and Consortium will provide for NetLibrary any individual information needed to identify said Member(s) and to provide them and their Patrons access. The Members of Consortium at the time this Agreement was executed are listed on Exhibit C.
12. "Member's NL Website" means the Website account operated by NetLibrary and open to the Member for which it is created and such Member's Patrons in order to access and utilize the Shared Collection(s).
13. "NL Website" means the Website operated by NetLibrary and open to the general public in order to provide information about NetLibrary's products and services.
14. "Patrons" mean Consortium's employees and other authorized users and Member's registered faculty, members, patrons, students, and other authorized users, including both onsite users and remote users. Patrons are individuals and may not be corporations or other entities. As used herein, Patrons may refer to Consortium's Patrons, Member's Patrons or all Patrons, as the case may be depending on the context.
15. The "Shared Collection(s)" means the collection(s) of Audio Books licensed to Consortium for access and use by Consortium, Members and Patrons pursuant to the terms and conditions of this Agreement.
16. Subject to Section II.A below, the "Term" of this Agreement includes an "Initial Term," which commences on the Effective Date and continues in effect for one year, and any "Renewal Term(s)," which are automatic one year extensions of this Agreement that commence on each anniversary of the Effective

Date unless this Agreement is terminated according to Section II.A.1 below.

17. A "Unique Collection" is a collection of Audio Books chosen by a Member and licensed to such Member pursuant to the terms and conditions of a separate "Library Audio Book Agreement" by and between NL and such Member. A Unique Collection remains separate from the Shared Collection(s). A Member may purchase Audio Book Licenses to a Unique Collection either directly from NL or through Consortium acting as such Member's agent pursuant to the Library Audio Book Agreement.

#### B. Audio Book Licenses.

##### 1. Purchase of Licenses.

a. **Audio Books.** During the Term of the Agreement, Consortium may select and purchase Audio Book Licenses in accordance with NetLibrary's then current ordering practices. NetLibrary will make the Audio Books Licenses available to Consortium according to NetLibrary's agreements with its content providers, and partners. Such Audio Books will be a part of the Shared Collection. Consortium will be solely responsible for ensuring that it does not acquire or use Audio Books in violation of the laws of the Jurisdiction, and that all Consortium's activities hereunder comply in all respects with the applicable laws of the Jurisdiction. Each final order of Audio Book Licenses is incorporated in this Agreement by reference.

b. **MARC Records.** As part of the relevant Platform Fee; NetLibrary will provide Consortium with one copy of the MARC Record that corresponds to each Audio Books License purchased by Consortium for the Unique Collection. NetLibrary and Consortium agree that all MARC Records are the property of OCLC; Consortium may use MARC Records only for its own internal purposes as further described in Exhibit B. NetLibrary will replace defective MARC Records if Consortium notifies NetLibrary of the defect within 90 days of NetLibrary's delivery of the MARC Record to Consortium and NetLibrary concurs that the MARC Record is defective.

2. **Copyrighted Works.** Consortium acknowledges and agrees that the copyright to each Audio Book is owned by or licensed to NetLibrary and the respective publisher thereof. All Rights Reserved. By purchasing a license to an Audio Book, Consortium obtains certain rights to access and use a copy of the Audio Book under this Agreement, but neither Consortium, Member, nor Patrons obtain or own any rights in the copyrights or any other intellectual property rights that may be associated with the Audio Book. Consortium agrees that it is responsible for all use of Audio Books by Consortium, its Members, and its Patrons, and that any use of Audio Books by Consortium and its Patrons is governed by and will comply with applicable laws, including without limit U.S. copyright laws. Consortium acknowledges that it and its Patrons have no right to make copies of any Audio Book, or any portions thereof, except to the extent permitted by applicable copyright laws and neither it, Members, nor Patrons have any right to grant any third parties the right to use any Audio Book (for purposes of this sentence, third parties does not include Patrons).

##### C. Consortium Services.

Consortium will assist NetLibrary in the marketing of Audio Books and Platform Services to Members. During the term of this Agreement, Consortium may act as an agent for a Member listed on Exhibit C. Consortium may aggregate sales and accept invoices from NetLibrary for Audio Book Licenses for a Shared Collection and related Audio Book Services only if such are purchased by a Member listed on Exhibit C, and in such event, Consortium will pay such invoices pursuant to the terms and conditions set forth in this Agreement.

## II. GENERAL PROVISIONS

### A. Termination.

1. **Termination Without Cause.** Either party may terminate this Agreement without cause effective upon the conclusion of the then current Initial Term or Renewal Term, as applicable, by providing the other party with at least 60 days prior written notice of its intent



to do so.

2. **Termination for Cause.** Either party may terminate this Agreement for cause at any time by providing the other party with prior written notice of the occurrence of any of the following events:

- a. a party fails to timely pay any amounts due and payable, provided that the nonpayment is not cured within 10 days of the notice; or
- b. a party violates any material provision of this Agreement, including without limit a material failure to provide required services, a breach by Consortium, a Member, or Patrons of copyrights laws, failure to comply with any security documents or a breach of the confidentiality provisions of this Agreement, or otherwise has committed breaches of this Agreement that, in the aggregate, are material, provided that the breach(es) cannot be, or is(are) not, cured within 60 days of the notice.

3. **Survival.** All terms of this Agreement that are intended to survive termination for any reason of this Agreement will so survive, including without limit Section I.B.2; Section(s) III.B, C, D, E, F, G, H.5 and H.13; and Section D of Exhibit A.

**B. Limited Warranty.**

NetLibrary warrants that, as to any Audio Books licensed to Consortium under this Agreement, NetLibrary has the necessary authority to license the Audio Books to Consortium and to provide Platform Services to Consortium. NetLibrary warrants that it will use its commercially reasonable efforts to provide Platform Services as described in this Agreement.

**C. Warranty Disclaimer.**

EXCEPT AS EXPRESSLY PROVIDED IN SECTION II.B ABOVE, CONSORTIUM'S NL WEBSITE, MEMBER'S NL WEBSITE(S), PLATFORM SERVICES, AND ALL AUDIO BOOKS LICENSED UNDER THIS AGREEMENT ARE PROVIDED "AS IS" WITHOUT ANY WARRANTY OF ANY KIND AND NETLIBRARY ITS CONTENT PROVIDERS, AND CONSORTIUM EXPRESSLY DISCLAIM ALL IMPLIED WARRANTIES, INCLUDING WITHOUT LIMIT THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE. NEITHER NETLIBRARY, ITS CONTENT PROVIDERS, NOR CONSORTIUM WARRANTS, GUARANTEES OR MAKES ANY REPRESENTATIONS REGARDING THE USE, OR THE RESULTS OF THE USE, OF CONSORTIUM'S NL WEBSITE, MEMBER'S NL WEBSITE(S), OR AUDIO BOOKS. NO ORAL OR WRITTEN INFORMATION OR ADVICE GIVEN BY NETLIBRARY OR CONSORTIUM OR EMPLOYEES OF EITHER PARTY WILL CREATE A REPRESENTATION OR WARRANTY OR IN ANY WAY INCREASE THE SCOPE OF NETLIBRARY'S OBLIGATIONS, AND CONSORTIUM MAY NOT RELY ON ANY SUCH INFORMATION OR ADVICE.

**D. Indemnity.**

NetLibrary will defend, indemnify, and hold Consortium harmless from any action based solely on a claim that Audio Books furnished and used within the scope of this Agreement infringe any copyright of any third party, except that this indemnity will not apply to copyright claims arising from content that has been provided to NetLibrary by publishers and is provided by NetLibrary without substantive modification (except for conversion to digital format). Consortium will defend, indemnify, and hold NetLibrary harmless from any action based on a claim that Consortium has failed to comply with the laws of the Jurisdiction or that the use by Consortium, Members, or Patrons of Consortium's NL Website, Member's NL Website, if applicable, or Audio Books in violation of the terms of this Agreement infringes any copyrights or trade secrets of any third party.

**E. Limitation on Liability.**

Neither party will claim special, incidental, indirect, or consequential damages; including without limit lost profits, for breach of this Agreement. This limitation will also apply to any claims brought against NetLibrary's content providers. Remedies are limited to claims for amounts due, for injunctive relief only as provided, or for direct damages. Except as provided in Section

III.D. above, a party's aggregate liability for any and all claims, losses, liabilities, and demands arising, whether for breach of contract, in tort or otherwise, are limited to the total amount of Audio Book License Fees, and Platform Fees (collectively, "Fees") paid by Consortium to NetLibrary, during the 12 month period immediately preceding the date on which the claim first arose. Notwithstanding any other provision of this Agreement, the nonbreaching party may seek injunctive relief in any court of competent jurisdiction to enjoin or restrain the breaching party from continuing to do any act or commit any violation or threatened violation of this Agreement, and the prevailing party, if any, on a claim for injunctive relief is entitled to recover its reasonable attorney fees incurred in connection with that proceeding. Injunctive relief will be without prejudice to the nonbreaching party's right to also seek money damages for breach of this Agreement.

**F. Confidential Information.**

To the extent allowed by applicable law, Consortium agrees that it will not use or disclose information relating to (i) the terms of this Agreement, (ii) the content of reports delivered under this Agreement, (iii) pricing terms and other business arrangements governed by this Agreement and (iv) any other documents provided by NetLibrary that have a confidential, proprietary or other similar designation or should reasonably be believed to be the confidential or proprietary information of NetLibrary or its content providers. Notwithstanding the foregoing, Consortium may disclose such information to Members, provided that Members are required to hold such information in confidence and Consortium remains responsible for the disclosure of such information.

**G. Payment Terms.**

All fees and charges are due and payable 30 days from the date of the related invoice. NetLibrary or Consortium has the right to charge 1.5% interest per month on any invoice that remains unpaid longer than 30 days from the date of the invoice; in addition, NetLibrary may deny Consortium, Members, and Patrons access to Consortium's NL Website and Member's NL Website, if applicable, until the unpaid invoice is paid in full. Consortium will be solely responsible for remitting to NetLibrary all sums due pursuant to this Agreement. Consortium may determine the amounts that Members will pay Consortium for the Audio Book Licenses and Platform Services provided hereunder, and Consortium may collect such amounts from Members.

**H. Other Provisions.**

1. **Entire Agreement.** All exhibits referred to in this Agreement are incorporated in this Agreement by reference. Any modification or amendment to Section(s) B. and C of Exhibit A under Section II.H.2 below will also be incorporated in this Agreement by reference. This Agreement sets forth the entire agreement between the parties with respect to the subject matter of the Agreement, merges all discussions between them and supersedes and replaces any and every other prior or contemporaneous agreement, understanding or negotiation that may have existed between NetLibrary and Consortium to the extent that any such agreement relates to the subject matter of the Agreement. This Agreement governs all orders for Audio Books and Platform Services placed by Consortium for the Shared Collection during the Term.

2. **Modification or Amendment.** Notwithstanding any other provision in this Agreement, NetLibrary will have the right to modify and amend Section(s) B. and C of Exhibit A to this Agreement provided that NetLibrary provides Consortium with at least 30 days prior written notice; and, in this event, the modified or amended Exhibit(s) will not be effective before the end of the 30 day notice period. Any other modification or amendment of this Agreement must be in writing and signed by a duly authorized representative of each party. For clarification, no term contained in a purchase order or other similar document submitted to NetLibrary by Consortium or any Member will become binding on the parties unless and until the term is mutually agreed upon in a written modification or amendment to this Agreement as described above.



3. **Assignment.** Neither party may sell, assign, transfer or convey this Agreement or any rights and obligations without the prior written consent of the other party, which will not be unreasonably withheld. Notwithstanding the foregoing, NetLibrary reserves the right to assign or transfer this Agreement to an affiliated company or to a third party that acquires substantially all of its assets upon written notice to the Consortium.
4. **Successors and Assigns.** This Agreement will be binding upon and inure to the benefit of the parties and their respective permitted successors and assigns.
5. **Governing Law, Jurisdiction and Venue.** This Agreement will be governed by the laws of the State of Colorado, U.S.A. without regard to any conflict of laws provisions contained in this Agreement. NetLibrary and Consortium agree that any action arising from or out of the negotiations, execution, interpretation or enforcement of this Agreement may be brought in the state or federal courts located in the State of Colorado, U.S.A. Consortium hereby consents to jurisdiction and venue in the state and federal courts in Colorado, U.S.A.
6. **Interpretation.** The use of headings in this Agreement is solely for the mutual convenience of the parties and will not affect the construction.
7. **Severability.** If any provision of this Agreement proves to be illegal, invalid or unenforceable, the remainder of this Agreement will not be affected thereby, and in lieu of any provision of this Agreement that is illegal, invalid or unenforceable, there will be added as a part of this Agreement a provision as similar in terms to the illegal, invalid or unenforceable provision as may be possible to be legal, valid and enforceable.
8. **Further Assurances.** Consortium and NetLibrary agree to take the further actions and to execute the further documents as may be necessary or appropriate to effectuate this Agreement and the transactions contemplated in this Agreement.
9. **Force Majeure.** Consortium acknowledges that the Internet is an insecure, unstable, unregulated, unorganized and unreliable environment, and that the ability of NetLibrary to deliver Platform Services may depend upon the Internet and equipment, software, systems, data and services provided by various telecommunications carriers, equipment manufacturers, firewall providers, encryption system developers and other vendors and third parties. Neither party will be liable for, or have the right to terminate this Agreement as a result of, any delays or failures to perform any of its obligations under the Agreement to the extent that the delays or failures are due to circumstances beyond its reasonable control, including without limit acts of God; strikes; riots; acts of war; power failures; and functions or malfunctions of the Internet, telecommunications services, firewalls, encryption systems, and security devices; or governmental regulations imposed after the Effective Date.
10. **Waiver.** The waiver by either party of any right granted under this Agreement will not be deemed a waiver of any other right granted under this Agreement, or a precedent for any subsequent waiver.
11. **No Partnership.** As to one another the parties are considered independent contractors. It is not the intention of the parties to create, nor will this Agreement be construed as creating, a partnership, joint venture, agency relationship, or other association; or render the parties liable as partners, co-venturers, agents, or principals.
12. **No Third Party Beneficiaries.** This Agreement is not intended to confer any benefit on any person or entity not a party to this Agreement.
13. **Notices.** Any notice, demand, request, consent, approval or other communication (collectively, "Notices") required or permitted to be given under this Agreement will be in writing and sent by hand delivery, special courier capable of confirming receipt, United States Mail (certified mail, return receipt requested), or facsimile or e-mail to a non-individual-specific e-mail address if receipt is confirmed. The parties acknowledge and agree that a Notice might not be deemed effective if receipt is not confirmed. Notices will be deemed given under the following rules: if hand delivered, at the time of delivery; if sent by special courier, on the third day after delivery to the courier; if mailed, on the seventh day after deposit in the United States Mail; and if sent by facsimile or e-mail to a non-individual-specific e-mail address, on the date transmitted if the sender receives confirmation that the transmission was received during the notified party's normal business hours, otherwise on the notified party's next normal business day. Notices will be sent to the following addresses:

	If to NL:	If to Consortium:
	NetLibrary, a division of OCLC Online Computer Library Center, Inc.	BIBLIOGRAPHICAL CENTER FOR RESEARCH
Address:	4888 Pearl East Circle, Suite 103	14394 E EVANS AVE,
Address:	Boulder, Colorado 80301	Aurora, CO 80014- 1478
Attention:	Sales Management	BRENDA BAILEY- HAINER
Telephone:	(303) 415-2648	(303) 751-6277
Facsimile:	(303) 381-8600	(303) 751-9787
e-mail address:	sales@netlibrary.com	gharris@bcr.org

14. **Facsimile Copies.** A copy of the signed original of this Agreement transmitted by facsimile machine will be binding on both parties and have the same force and effect as the signed original.

#### EXHIBIT A TO CONSORTIUM AGREEMENT FOR AUDIO BOOK PURCHASES -- PLATFORM FEE

##### A. Definitions.

1. **"Limiting Access Measures"** mean appropriate measures to limit the use of Audio Books through access by Patrons. Limiting Access Measures are to comply with NetLibrary's reasonable application requirements which may change from time to time and may include, but are not limited to, remote patron authentication applications, authentication through protected IP addresses, a patterned identification check and privileged user accounts. NetLibrary will consider other Limiting Access Measures on a case-by-case basis, but may reject the proposed methods if, in NetLibrary's opinion, access will not be sufficiently controlled.
2. **"Platform Fee"** means the fee Consortium pays to maintain Consortium's NL Website and Member's NL Website, if applicable, and to maintain and upgrade the Existing Platform and bandwidth. Platform Fees include Platform Services. Consortium may pay the

Platform Fee on the basis described in this Exhibit A.

3. **"Platform Services"** mean NetLibrary's services related to Consortium's ongoing access to and use of Audio Books or Subscription(s) to Audio Books via the Internet and Consortium's NL Website and Member's NL Website, if applicable, as further described in this Exhibit A.
3. The **"Reinstatement Fee"** means the fee associated with reinstating Platform Services for an Audio Book for which Platform Services were previously terminated, as further described in this Exhibit A.

##### B. Annual Platform Fee.

1. The Annual Platform Fee for an order will equal 10% of the Audio Book List Price(s) for all the Audio Book(s) in the order at the time of initial licensing.



2. Upon payment of an Annual Platform Fee, NetLibrary will host and provide Platform Services for the effected Audio Books for 1 year from the purchase date.
3. The first payment of the Annual Platform Fee for an order will be due and payable at the time the Consortium purchases the Audio Book Licenses, and will be included on the Invoice for the corresponding Audio Book License Fees.
4. NetLibrary may calculate and invoice Annual Platform Fees for the first year on an annualized basis. NetLibrary will calculate and invoice Annual Platform Fees for the second and subsequent years on an annualized basis on a single date each year.
5. The Reinstatement Fee for an Audio Book will equal 10% of the Audio Book List Price.
6. The Annual Platform Fee in the second and subsequent years will be reduced by the portion of the first year Annual Platform Fee attributable to any Audio Book removed from, and not reinstated to, Consortium's Audio Book collection as further described in this Exhibit.
7. If NetLibrary elects not to continue to support the Existing Platform at any time due to technological obsolescence or cessation of third party vendor support, NetLibrary may charge Consortium additional fees for migrating the Audio Books for which Consortium is paying the Annual Platform Fee to a replacement platform, subject to any applicable limitations as set out on Exhibit A.

#### C. Platform Services

##### 1. Provision and Delivery of Platform Services.

- a. If Consortium has paid the Platform Fee; then, subject to the terms of this Agreement, Consortium will receive Platform Services.
- b. Platform Services include:
  - i. establishing and administering Consortium's NL Website and Member's NL Websites, if appropriate,
  - ii. hosting the Audio Books or Audio Books Collection, as applicable, on Consortium's NL Website,
  - iii. providing management services for the Shared Collection(s), and
  - iv. providing access - to Consortium, Members, and Patrons - to Consortium's Audio Books or Audio Books Collection, as applicable, through Consortium's NL Website.
- c. Consortium, Members, and Patrons will access Platform Services via Consortium's Internet connection or Member's Internet connection, as applicable, which will be Consortium's expense and responsibility or Member's expense and responsibility, as applicable.
- d. NetLibrary will provide Platform Services for as long as Consortium continues to pay the Platform Fee. NetLibrary continues to support the Existing Platform, and Consortium has not notified NetLibrary to remove the Audio Books from Consortium's NL Website.
- e. Removing and Reinstating Audio Books.
  - i. Consortium may elect to have any Audio Books removed from Consortium's NL Website, by providing NetLibrary with written notice of the election within 60 days of the annualized date on which Platform Fees are calculated and invoiced.
  - ii. Consortium may elect to have any Audio Books reinstated to Consortium's NL Website, by providing NetLibrary with written notice of the election within 60 days of the annualized date on which Platform Fees are calculated and invoiced and by paying the applicable Reinstatement Fee as further described in Exhibit A. Platform Fees for reinstated Audio Books are due and payable on the reinstatement date.
- f. Notwithstanding any other provision of this Agreement, if NetLibrary terminates this Agreement for cause under Section II.A.2. of the Agreement, then NetLibrary's obligation to provide Audio Books and Platform Services will expire.

##### 2. Support for NL Website and Consortium's NL Website.

- a. Existing Platform. At the time this Agreement is executed, the

NL Website, the Consortium's NL Website, and the Member's NL Website are supported by NetLibrary's existing electronic bookshelf technology, which includes a third party operating system, third party database management software, and proprietary NetLibrary software (collectively, the "Existing Platform"). NetLibrary will not charge any fees to continue to support the operation of the Existing Platform, except as may be provided in this Agreement.

- b. Platform Commitment Date. Initially, the "Platform Commitment" Date will be July 1, 2012. However, NetLibrary may publish or announce a specific date as the Platform Commitment Date or a change in the practice of determining the Platform Commitment Date, provided that the publication or announcement will only be applicable to purchases of Audio Books licenses made after the date of the publication or announcement.
- c. Migration. If the Existing Platform becomes technologically obsolete and/or third party vendors cease to support third party components of the Existing Platform before the Platform Commitment Date; then, except as may be provided in this Agreement, NetLibrary will not charge Consortium any additional fees to support the Existing Platform until the Platform Commitment Date or to migrate Consortium's Audio Books to a replacement platform before the Platform Commitment Date. If the Existing Platform becomes technologically obsolete and/or third party vendors cease to support third party components of the Existing Platform after the Platform Commitment Date, then NetLibrary may charge fees to support a replacement platform or to migrate Consortium's Audio Books to a replacement platform.

##### 3. Patron Access.

Consortium will implement and maintain Limiting Access Measures, based on NetLibrary's standard systems, which will control Consortium's, Members' and Patrons' access to Consortium's NL Website, and Members NL Website, if applicable.

##### 4. Reports.

Payment of the Platform Fees entitles Consortium to the standard reports offered by NetLibrary. These reports may be modified by NetLibrary from time to time and may include without limit: current discount schedule, transaction history, owned Audio Books, popular Audio Books, Audio Books not owned, all Audio Books, new Audio Books, activity by subject area and activity by title. Nonstandard reports may be developed for a fee on a case-by-case basis.

#### D. Consortium and Patron Usage.

1. Limiting Access Measures. Consortium will be solely responsible for determining which Members will have access to Consortium's NL Website and Member's NL Website, as applicable, under this Agreement. Consortium and Members will be jointly responsible for determining which Patrons will have access to Consortium's NL Website and Member's NL Website, as applicable, under this Agreement. Consortium agrees to: (a) implement Limiting Access Measures within a reasonable time frame, (b) communicate to Members the requirement to implement Limiting Access Measures, and (c) reasonably assist NetLibrary in bringing a Member into compliance with Limiting Access Measures if the Member is discovered to be out of compliance. NetLibrary, in its sole discretion, may discontinue Consortium's or a Member's access to Consortium's NL Website and Member's NL Website, as applicable, if Consortium or the Member fails to implement Limiting Access Measures within a reasonable timeframe. Except for standard fees charged by Consortium to Members and/or Patrons, neither Consortium nor Members will charge any Patron for use of Consortium's NL Website or Member's NL Website, if applicable.

2. Terms of Use. The use of Member's NL Website and Consortium's NL Website, as applicable, by Consortium, Members, and Patrons will be governed by the "Terms of Use" currently available at <http://www.netlibrary.com/TermsOfUse.aspx>, as they may be amended from time to time, which are incorporated in this

Agreement by reference. If a Consortium, a Member, or a Patron violates the Terms of Use, NetLibrary reserves the right, in its sole discretion, to suspend or terminate Consortium's, the Member's, or the Patron's access to and use of Consortium's NL Website and Member's NL Website, as applicable. At its sole option, NetLibrary may notify Consortium of any violation by a Member or a Patron of the Terms of Use, and in the event, also at its sole option, NetLibrary may grant Consortium three days to attempt to correct the violation by a Member or a Patron and NetLibrary will not terminate the Member's or Patron's access to and use of Consortium's NL Website and Member's NL Website if the violation is corrected within the three day period. Consortium acknowledges and agrees that, in the case of repeated or persistent violations, NetLibrary may not provide the aforementioned notice and correction period to Consortium. Repeated or persistent violations of the Terms of Use by Consortium, Members, or Patrons may be cause for termination of this Agreement by NetLibrary.

3. Tools. Neither Consortium nor Members, if applicable, will use, implement or authorize use of any computerized or automated tool or application to search, index, test or otherwise obtain information from Consortium's NL Website and Member's NL Website, as applicable, including without limit any "spidering" or web crawler application (collectively, "Tools"), without obtaining the prior written approval of NetLibrary. NetLibrary will not unreasonably withhold this approval, provided that the proposed use of Tools does not (i) present a risk of interfering with use of NL Website by Members, Patrons or other NetLibrary end-users; (ii) degrade or impair the performance of NL Website; (iii) cause NetLibrary to violate its agreements with its other end-users, its publishers or other third parties; or (iv) constitute a violation of applicable law, including without limit U.S. copyright law. Consortium acknowledges and agrees that NetLibrary may from time to time implement controls on Consortium's NL Website and Member's NL Website, if applicable, to regulate or restrict the use of Tools.

E. Member Access.

1. Shared Collection(s) Access. NetLibrary will only permit access to and use of a Shared Collection(s) by a Member of Consortium and the Member's Patrons if:

- a. Consortium has executed a Consortium Agreement with NetLibrary,
- b. Consortium has given NetLibrary written notice that Consortium is willing to allow the Member to access a particular Shared Collection, and
- c. the Member has executed a Member Audio Book Agreement with NetLibrary.

Until all of these conditions have been satisfied, NetLibrary will have no obligation to permit any Member of Consortium to access any Shared Collection of Consortium.

2. Shared Collection(s) Parameters. At the time of purchase the Shared Collection closes. NetLibrary will provide access to this Shared Collection to the Members that Consortium has authorized to access the Shared Collection by giving NetLibrary written notice within 30 days after the Shared Collection closes. NetLibrary will not provide access to this Shared Collection to any Members that Consortium has not authorized to access the Shared Collection by giving NetLibrary written notice within 30 days after the Shared Collection closes.

3. Unique Collection. Though Consortium Members for whom Consortium has not given NetLibrary written notice are not permitted to access the Shared Collection(s), Consortium and some number of its Members can purchase additional Audio Books on a shared basis by purchasing another Shared Collection. Members can also purchase a Unique Collection.

4. Notice Requirements. In addition to giving NetLibrary written notice that Consortium is willing to allow a Member to access a particular Shared Collection, Consortium will provide for NetLibrary any individual information needed to identify the Member(s) and to provide them and their Patrons access to the Shared Collection.



## EXHIBIT B TO CONSORTIUM AGREEMENT FOR AUDIO BOOK PURCHASES - GUIDELINES FOR THE USE AND TRANSFER OF OCLC-DERIVED RECORDS

REVISION OF NOVEMBER 16, 1987

## I. GUIDELINES

(See Definitions in Part II below)

1. Each member and nonmember library may use records without restriction, and may transfer records of its own holdings without restriction to other libraries.
2. In addition to transfers to libraries, each member and nonmember library may transfer records of its own holdings without restriction, to (a) member networks, (b) state and multi-state library agencies and (c) all other noncommercial firms.
  - a. Member networks may produce and transfer to any member library, copies on magnetic tape of records used or inserted into the OCLC database by the library. Each member network also may process records of the holdings of any member or nonmember library which has employed and agreed to pay it for that service, provided the member network has first signed either an individual agreement with the library, or a general agreement with OCLC, containing measures agreed upon by OCLC and the member network for protection of the records it has been employed to process. Any other use and transfer of records by member networks will be as provided in separate understandings with OCLC.
  - b. The use and transfer of records by library systems or projects operated by or under the aegis of one or more state or national library agencies will be as provided in separate understandings with OCLC. Such understandings may include (i) arrangements to incorporate state or national bibliographic databases into the OCLC system, (ii) paid-up licenses to use records in state or national programs (e.g., by means of payments for OCLC multi-institution tapes) and/or (iii) any other understandings that will facilitate state or national programs as well as the maintenance and enhancement of the OCLC database.
  - c. The use and transfer of records by any other organizations to which transfers are made under this Guideline 2 will be as provided in separate understandings with OCLC.
3. In addition, each member and nonmember library may transfer records of its own holdings to commercial firms which the library has employed and agreed to pay to process such records, provided that each commercial firm has first signed an individual agreement with the library, or OCLC has advised the library that the commercial firm has signed a general agreement with OCLC, in either case containing measures agreed upon by OCLC and the commercial firm for protection of the records it has been employed to process. In addition, each member and nonmember library may make any other transfers of records to commercial firms, subject to prior written agreements with OCLC. However, there is no requirement for prior written agreements (a) for transfers made under Guideline 1 above to libraries operated by commercial firms or (b) for transfers to commercial firms by former OCLC member libraries of records of their holdings, so long as the libraries maintain no continuing user status with OCLC.
4. When a nonmember organization makes bibliographic information available to OCLC which is subject to usage or transfer restrictions imposed by such nonmember organization, and OCLC nevertheless elects to accept the information for addition to the OCLC database, OCLC will notify libraries to which it makes the information available, and rights to use and transfer records based on such information will be subject to the same restrictions.
5. When transfers under Guideline 1 above are made to machine-readable union catalogs accessible by nonmember libraries, it is requested that machine-readable copies of the records of such union catalogs be submitted to OCLC. OCLC, at its own expense, will have the right to add such records to its database for all uses consistent with its chartered purposes.
6. The Guidelines above apply to all uses and transfers of records except where a mutually acceptable agreement establishing broader or narrower rights is made with OCLC relating to a specific product or service.

## II. DEFINITIONS

1. The term "member library" means a general member of OCLC as defined in its Code of Regulations.
2. The term "nonmember library" means any library other than a member library.
3. A "member network" is an OCLC-affiliated regional, state or multi-state library network organization which is in contract with OCLC to provide OCLC services and products, or to assist OCLC to provide such services and products, to general members of OCLC.
4. A "commercial firm" is any organization permitted, under applicable law, to operate on a for-profit basis.
5. The term "records" means bibliographic records and holdings data (including copies thereof) derived from the OCLC database, including derivative works made from such records, and either received in machine-readable form or converted by the transferee into machine-readable form. The term also includes such records when held only in eye-readable form, in the case of proposed transfers to commercial firms. However, records do not include, as to any member or nonmember library (a) bibliographic records designated in the OCLC database as original cataloging by such member or nonmember library and (b) bibliographic records derived by such member or nonmember library from sources other than the OCLC database and to copies of which in the OCLC database its holdings symbol has been attached by taping. Such excluded records are freely transferable and are not dealt with in these Guidelines. OCLC-derived records held only in eye-readable form are freely transferable except to commercial firms.
6. The terms "transfer" and "transfer of records" refer to all sales, exchanges, gifts, sharing and other transfers, and all online access except online access provided to end-user patrons of a library in authorized possession of the records.

EXHIBIT C TO CONSORTIUM AGREEMENT FOR AUDIO BOOK PURCHASES

*Consortium's Members*

As of   /  /07



## EXHIBIT D TO CONSORTIUM AGREEMENT FOR AUDIO BOOK PURCHASES - LIBRARY AUDIO BOOK AGREEMENT

## BCR MEMBER TERMS AND CONDITIONS

Library Agreement for Audio Book Purchases.....	Error! Bookmark not defined.
I. DEFINITIONS; AUDIO BOOK LICENSES.....	10
A. Definitions.....	10
B. Audio Book Licenses.....	11
II. GENERAL PROVISIONS.....	11
A. Termination.....	11
B. Limited Warranty.....	11
C. Warranty Disclaimer.....	11
D. Indemnity.....	11
E. Limitation on Liability.....	12
F. Confidential Information.....	12
G. Payment Terms.....	12
H. Other Provisions.....	12
Exhibit A to Library Agreement for Audio Book Purchases - Platform Fee.....	13
A. Definitions.....	13
B. Annual Platform Fee.....	13
C. Platform Services.....	13
D. Member and Patron Usage.....	14
Exhibit B to Library Agreement for Audio Book Purchases - Guidelines for the Use and Transfer of OCLC-Derived Records.....	15

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed by their duly authorized representatives, to be effective as of the Effective Date, as set forth below.

Member: \_\_\_\_\_  
 By: \_\_\_\_\_  
 Name: \_\_\_\_\_  
 Title: \_\_\_\_\_  
 Date: \_\_\_\_\_

NetLibrary: NetLibrary, a division of OCLC Online  
 Computer Library Center, Inc.  
 By: \_\_\_\_\_  
 Name: Rick Schwietzman  
 Title: Vice President and Chief Financial  
 Officer  
 Date: \_\_\_\_\_

THIS LIBRARY AGREEMENT FOR AUDIO BOOK PURCHASES (this "Agreement") is by and between \_\_\_\_\_ ("Member") and NetLibrary, a division of OCLC Online Computer Library Center, Inc., an Ohio nonprofit corporation ("NetLibrary").

WHEREAS, NetLibrary has acquired certain rights to convert various books and other works to electronic format and to market and distribute the works as converted as Audio Books, and NetLibrary operates an electronic library service for hosting and managing Audio Books and other materials over the Internet,

WHEREAS, NetLibrary and BCR ("Consortium") have entered into a consortium Audio Book agreement (the "Consortium Audio Book Agreement").

WHEREAS, Consortium has given NetLibrary written notice that Consortium is willing to allow Member to access a particular Shared Collection and Member has been designated a "Member" of Consortium as defined in the Consortium Audio Book Agreement (for clarification, capitalized terms used herein and not defined herein will have the meanings assigned to them in the applicable Consortium Audio Book Agreement).

WHEREAS, Member desires to purchase licenses to certain Audio Books, as part of the discrete Shared or Unique Collection; subject to the terms and conditions described in this Agreement.

IN CONSIDERATION OF THE MUTUAL COVENANTS AND OBLIGATIONS SET FORTH BELOW, the parties agree as follows.

## I. DEFINITIONS; AUDIO BOOK LICENSES

## A. Definitions.

Terms defined within this Agreement have the respective meanings attributed to them throughout this Agreement or in this Section I.A. Any defined term may be used in the singular and in the plural, as appropriate in the context.

1. "Audio Books" mean NetLibrary's electronic versions of certain Audio Books and other works in which NetLibrary has acquired certain rights.
2. The "Audio Books License" means a license to use the relevant Audio Books(s).
3. The "Audio Books License Fee" means a one-time-only fee for Member's license to use the relevant Audio Books(s) and is determined by subtracting the applicable Discount from the Audio Books List Price.
4. The "Audio Books List Price" means the price established by NetLibrary for the license to use the relevant Audio Books(s).
5. "Discount" means the percentage of the Audio Books List Price used in determining the Audio Books License Fee. Discounts do not apply to Platform Services.
6. The "Effective Date" of this Agreement means the latest execution date set forth on the signature block below or the date on which Member or any Patron may first access Audio Books, whichever date occurs first.
7. "Member's NL Website" means the Website operated by NetLibrary and open to Member and Patrons in order to access and use Audio Books licensed to Member.

8. A "MARC Record" means an electronic record containing metadata and other relevant information about the corresponding Audio Book.
9. "NL Website" means the Website operated by NetLibrary and open to the general public in order to provide information about NetLibrary's products and services.
10. "Patrons" mean Member's registered faculty, members, patrons, students, and other authorized users, including both onsite users and remote users. Patrons are individuals and may not be corporations or other entities.
11. The "Shared Collection(s)" means a collection(s) of Audio Books licensed to Consortium for access and use by Consortium and its participating Members and Patrons (as such terms are defined in the applicable Consortium Audio Book Agreement) under the terms and conditions of the Consortium Audio Book Agreement with respect to Shared Collection(s) and this Agreement; nothing in this Agreement is intended to grant Member any rights in the Shared Collection(s) without completion of appropriate paperwork and payment of related fees.
12. Subject to Section II.A below, the "Term" of this Agreement includes an "Initial Term," which commences on the Effective Date and continues in effect for one year, and any "Renewal Term(s)," which are automatic one year extensions of this Agreement that commence on each anniversary of the Effective Date unless this Agreement is terminated according to Section II.A.1 below.
13. A "Unique Collection" means a collection of Audio Books chosen by a Member and licensed to the Member under the terms and conditions of this Agreement. The Unique Collection remains separate from the Shared Collection(s). The Unique Collection is only accessible by Member and its Patrons; the Unique Collection is not accessible by Consortium or by nonpurchasing Members and Patrons (as such terms are defined in the applicable Consortium Audio Book Agreement).

#### B. Audio Book Licenses.

##### 1. Purchase of Licenses.

###### a. Audio Books.

- i. During the Term of the Agreement, Member may select and purchase Audio Book Licenses in accordance with NetLibrary's then current ordering practices. NetLibrary will make the Audio Books Licenses available to Member according to NetLibrary's agreements with its content providers, and partners. Each final order of Audio Book Licenses is incorporated in this Agreement by reference.
- ii. Member designates Consortium as its agent for acquiring rights to Audio Books on behalf of Member under the Consortium Audio Book Agreement and with the authority to act, including without limit ordering Audio Books, on behalf of Member under this Agreement and the Consortium Audio Book Agreement. NetLibrary is authorized to rely on this designation and to recognize Consortium as an agent of Member. Member agrees to comply with and be bound by all the provisions of the Consortium Audio Book Agreement applicable to "Members" as defined in the Consortium Audio Book Agreement.

- b. MARC Records. As part of the relevant Platform Fee, NetLibrary will provide Member with one copy of the MARC Record that corresponds to each Audio Books License purchased by Member for the Unique Collection. NetLibrary and Member agree that all MARC Records are the property of OCLC; Member may use MARC Records only for its own internal purposes as further described in Exhibit B. NetLibrary will replace defective MARC Records if Member notifies NetLibrary of the defect within 90 days of NetLibrary's delivery of the MARC Record to Member and NetLibrary concurs that the MARC Record is defective.

2. Copyrighted Works. Member acknowledges and agrees that the copyright to each Audio Book is owned by or licensed to NetLibrary and the respective publisher thereof. All Rights Reserved. By purchasing a license to an Audio Book, Member

obtains certain rights to access and use a copy of the Audio Book under this Agreement, but Member does not obtain or own any rights in the copyrights or any other intellectual property rights that may be associated with the Audio Book. Member agrees that it is responsible for all use of Audio Books by Member and its Patrons, and that any use of Audio Books by Member and its Patrons is governed by and will comply with applicable laws, including without limit U.S. copyright laws. Member acknowledges that it and its Patrons have no right to make copies of any Audio Book, or any portions thereof, except to the extent permitted by applicable copyright laws and neither it nor Patrons have any right to grant any third parties the right to use any Audio Book (for purposes of this sentence, third parties does not include Patrons).

#### II. GENERAL PROVISIONS

##### A. Termination.

1. Termination Without Cause. Either party may terminate this Agreement without cause effective upon the conclusion of the then current Initial Term or Renewal Term, as applicable, by providing the other party with at least 60 days prior written notice of its intent to do so.
2. Termination for Cause. Either party may terminate this Agreement for cause at any time by providing the other party with prior written notice of the occurrence of any of the following events:
  - a. a party fails to timely pay any amounts due and payable, provided that the nonpayment is not cured within 10 days of the notice; or
  - b. a party violates any material provision of this Agreement, including without limit a material failure to provide required services, a breach by Member or Patrons of copyrights laws, failure to comply with any security documents or a breach of the confidentiality provisions of this Agreement, or otherwise has committed breaches of this Agreement that, in the aggregate, are material, provided that the breach(es) cannot be, or is(are) not, cured within 60 days of the notice.

3. Survival. All terms of this Agreement that are intended to survive termination for any reason of this Agreement will so survive, including without limit Section I.B.2; Section(s) III.B, C, D, E, F, G, H.5 and H.13; and Section D of Exhibit A.

##### B. Limited Warranty.

NetLibrary warrants that, as to any Audio Books licensed to Member under this Agreement, NetLibrary has the necessary authority to license the Audio Books to Member and to provide Platform Services to Member. NetLibrary warrants that it will use its commercially reasonable efforts to provide Platform Services as described in this Agreement.

##### C. Warranty Disclaimer.

EXCEPT AS EXPRESSLY PROVIDED IN SECTION II.B ABOVE, MEMBER'S NL WEBSITE, PLATFORM SERVICES, AND AUDIO BOOKS LICENSED UNDER THIS AGREEMENT ARE PROVIDED "AS IS" WITHOUT ANY WARRANTY OF ANY KIND AND NETLIBRARY ITS CONTENT PROVIDERS, AND CONSORTIUM EXPRESSLY DISCLAIM ALL IMPLIED WARRANTIES, INCLUDING WITHOUT LIMIT THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE. NEITHER NETLIBRARY, ITS CONTENT PROVIDERS, NOR CONSORTIUM WARRANTS, GUARANTEES OR MAKES ANY REPRESENTATIONS REGARDING THE USE, OR THE RESULTS OF THE USE, OF MEMBER'S NL WEBSITE OR AUDIO BOOKS. NO ORAL OR WRITTEN INFORMATION OR ADVICE GIVEN BY NETLIBRARY OR CONSORTIUM OR EMPLOYEES OF EITHER PARTY WILL CREATE A REPRESENTATION OR WARRANTY OR IN ANY WAY INCREASE THE SCOPE OF NETLIBRARY'S OBLIGATIONS, AND MEMBER MAY NOT RELY ON ANY SUCH INFORMATION OR ADVICE.

##### D. Indemnity.

NetLibrary will defend, indemnify, and hold Member harmless from any action based solely on a claim that Audio Books furnished and used within the scope of this Agreement infringe any copyright of



any third party, except that this indemnity will not apply to copyright claims arising from content that has been provided to NetLibrary by publishers and is provided by NetLibrary without substantive modification (except for conversion to digital format). Member will defend, indemnify, and hold NetLibrary harmless from any action based on a claim that the use by Member or its Patrons of Member's NL Website, Consortium's NL Website or Audio Books in violation of the terms of this Agreement infringes any copyrights or trade secrets of any third party.

#### E. Limitation on Liability.

Neither party will claim special, incidental, indirect, or consequential damages; including without limit lost profits, for breach of this Agreement. This limitation will also apply to any claims brought against NetLibrary's content providers. Remedies are limited to claims for amounts due, for injunctive relief only as provided, or for direct damages. A party's aggregate liability for any and all claims, losses, liabilities, and demands arising, whether for breach of contract, in tort or otherwise, are limited to the total amount of eAudio Book License Fees, and Platform Fees (collectively, "Fees") paid by Member to NetLibrary, during the 12 month period immediately preceding the date on which the claim first arose. Notwithstanding any other provision of this Agreement, the nonbreaching party may seek injunctive relief in any court of competent jurisdiction to enjoin or restrain the breaching party from continuing to do any act or commit any violation or threatened violation of this Agreement, and the prevailing party, if any, on a claim for injunctive relief is entitled to recover its reasonable attorney fees incurred in connection with that proceeding. Injunctive relief will be without prejudice to the nonbreaching party's right to also seek money damages for breach of this Agreement.

#### F. Confidential Information.

To the extent allowed by applicable law, Member agrees that it will not use or disclose information relating to (i) the terms of this Agreement, (ii) the content of reports delivered under this Agreement, (iii) pricing terms and other business arrangements governed by this Agreement and (iv) any other documents provided by NetLibrary that have a confidential, proprietary or other similar designation or should reasonably be believed to be the confidential or proprietary information of NetLibrary or its content providers. Notwithstanding the foregoing, Member may disclose the aggregated content of reports delivered under Ex.A.C.4 to other library professionals.

#### G. Payment Terms.

At NetLibrary's discretion, either NetLibrary or Consortium may invoice Member for any fees and other charges due for the purchase of Member's Unique Collection(s) under this Agreement. Consortium will bill Member for amounts due with respect to Shared Collections. All fees and charges are due and payable 30 days from the date of the related invoice. NetLibrary or Consortium has the right to charge 1.5% interest per month on any invoice that remains unpaid longer than 30 days from the date of the invoice; in addition, NetLibrary may deny Member and Patrons access to Member's NL Website or Consortium's NL Website until the unpaid invoice is paid in full.

#### H. Other Provisions.

1. Entire Agreement. All exhibits referred to in this Agreement are incorporated in this Agreement by reference. Any modification or amendment to Section(s) B. and C of Exhibit A under Section II.H.2 below will also be incorporated in this Agreement by reference. This Agreement sets forth the entire agreement between the parties with respect to the subject matter of the Agreement, merges all discussions between them and supersedes and replaces any and every other prior or contemporaneous agreement, understanding or negotiation that may have existed between NetLibrary and Member to the extent that any such agreement relates to the subject matter of the Agreement. This Agreement governs all orders for Audio Books and Platform Services placed by Member during the Term.

2. Modification or Amendment. Notwithstanding any other provision in this Agreement, NetLibrary will have the right to modify and

amend Section(s) B. and C of Exhibit A to this Agreement provided that NetLibrary provides Member with at least 30 days prior written notice; and, in this event, the modified or amended Exhibit(s) will not be effective before the end of the 30 day notice period. Any other modification or amendment of this Agreement must be in writing and signed by a duly authorized representative of each party. For clarification, no term contained in a purchase order or other similar document submitted to NetLibrary by Member will become binding on the parties unless and until the term is mutually agreed upon in a written modification or amendment to this Agreement as described above.

3. Assignment. Neither party may sell, assign, transfer or convey this Agreement or any rights and obligations without the prior written consent of the other party, which will not be unreasonably withheld. Notwithstanding the foregoing, NetLibrary reserves the right to assign or transfer this Agreement to an affiliated company or to a third party that acquires substantially all of its assets upon written notice to the Member.

4. Successors and Assigns. This Agreement will be binding upon and inure to the benefit of the parties and their respective permitted successors and assigns.

5. Governing Law, Jurisdiction and Venue. This Agreement will be governed by the laws of the State of Colorado, U.S.A. without regard to any conflict of laws provisions contained in this Agreement. NetLibrary and Member agree that any action arising from or out of the negotiations, execution, interpretation or enforcement of this Agreement may be brought in the state or federal courts located in the State of Colorado, U.S.A. Member hereby consents to jurisdiction and venue in the state and federal courts in Colorado, U.S.A.

6. Interpretation. The use of headings in this Agreement is solely for the mutual convenience of the parties and will not affect the construction.

7. Severability. If any provision of this Agreement proves to be illegal, invalid or unenforceable, the remainder of this Agreement will not be affected thereby, and in lieu of any provision of this Agreement that is illegal, invalid or unenforceable, there will be added as a part of this Agreement a provision as similar in terms to the illegal, invalid or unenforceable provision as may be possible to be legal, valid and enforceable.

8. Further Assurances. Member and NetLibrary agree to take the further actions and to execute the further documents as may be necessary or appropriate to effectuate this Agreement and the transactions contemplated in this Agreement.

9. Force Majeure. Member acknowledges that the Internet is an unsecure, unstable, unregulated, unorganized and unreliable environment, and that the ability of NetLibrary to deliver Platform Services may depend upon the Internet and equipment, software, systems, data and services provided by various telecommunications carriers, equipment manufacturers, firewall providers, encryption system developers and other vendors and third parties. Neither party will be liable for, or have the right to terminate this Agreement as a result of, any delays or failures to perform any of its obligations under the Agreement to the extent that the delays or failures are due to circumstances beyond its reasonable control, including without limit acts of God; strikes; riots; acts of war; power failures; and functions or malfunctions of the Internet, telecommunications services, firewalls, encryption systems, and security devices; or governmental regulations imposed after the Effective Date.

10. Waiver. The waiver by either party of any right granted under this Agreement will not be deemed a waiver of any other right granted under this Agreement, or a precedent for any subsequent waiver.

11. No Partnership. As to one another the parties are considered independent contractors. It is not the intention of the parties to create, nor will this Agreement be construed as creating, a partnership, joint venture, agency relationship, or other association; or render the parties liable as partners, co-venturers, agents, or principals.



12. No Third Party Beneficiaries. This Agreement is not intended to confer any benefit on any person or entity not a party to this Agreement.

13. Notices. Any notice, demand, request, consent, approval or other communication (collectively, "Notices") required or permitted to be given under this Agreement will be in writing and sent by hand delivery, special courier capable of confirming receipt, United States Mail (certified mail, return receipt requested), or facsimile or e-mail to a non-individual-specific e-mail address if receipt is confirmed. The parties acknowledge and agree that a Notice might not be deemed effective if receipt is not confirmed. Notices will be deemed given under the following rules: if hand delivered, at the time of delivery; if sent by special courier, on the third day after delivery to the courier; if mailed, on the seventh day after deposit in the United States Mail; and if sent by facsimile or e-mail to a non-individual-specific e-mail address, on the date transmitted if the sender receives confirmation that the transmission was received during the notified party's normal business hours, otherwise on the notified party's next normal business day. Notices will be sent to the following addresses:

	If to NL:	If to Member:
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	NetLibrary, a division of OCLC Online Computer Library Center, Inc.	
Address:	4888 Pearl East Circle, Suite 103	
Address:	Boulder, Colorado 80301	
Attention:	Sales Management	
Telephone:	(303) 415-2548	
Facsimile:	(303) 381-8600	
e-mail address:	sales@netlibrary.com	

14. Facsimile Copies. A copy of the signed original of this Agreement transmitted by facsimile machine will be binding on both parties and have the same force and effect as the signed original.

#### EXHIBIT A TO LIBRARY AGREEMENT FOR AUDIO BOOK PURCHASES -- PLATFORM FEE

##### A. Definitions.

4. "Limiting Access Measures" mean appropriate measures to limit the use of Audio Books through access by Patrons. Limiting Access Measures are to comply with NetLibrary's reasonable application requirements which may change from time to time and may include, but are not limited to, remote patron authentication applications, authentication through protected IP addresses, a patterned identification check and privileged user accounts. NetLibrary will consider other Limiting Access Measures on a case-by-case basis, but may reject the proposed methods if, in NetLibrary's opinion, access will not be sufficiently controlled.
5. "Platform Fee" means the fee Member pays to maintain Member's NL Website and to maintain and upgrade the Existing Platform and bandwidth. Platform Fees include Platform Services. Member may pay the Platform Fee on the basis described in this Exhibit A.
6. "Platform Services" mean NetLibrary's services related to Member's ongoing access to and use of Audio Books or Subscription(s) to Audio Books via the Internet and Member's NL Website, as further described in this Exhibit A.
3. The "Reinstatement Fee" means the fee associated with reinstating Platform Services for an Audio Book for which Platform Services were previously terminated, as further described in this Exhibit A.

##### B. Annual Platform Fee.

1. The Annual Platform Fee for an order will equal 10% of the Audio Book List Price(s) for all the Audio Book(s) in the order at the time of initial licensing.
2. Upon payment of an Annual Platform Fee, NetLibrary will host and provide Platform Services for the effected Audio Books for 1 year from the purchase date.
3. The first payment of the Annual Platform Fee for an order will be due and payable at the time the Member purchases the Audio Book Licenses, and will be included on the invoice for the corresponding Audio Book License Fees.
4. NetLibrary will calculate and invoice Annual Platform Fees for the second and subsequent years on an annualized basis on a single date each year.
5. The Reinstatement Fee for an Audio Book will equal 10% of the Audio Book List Price.
6. The Annual Platform Fee in the second and subsequent years will be reduced by the portion of the first year Annual Platform Fee attributable to any Audio Book removed from, and not reinstated to, Member's Audio Book collection as further described in this Exhibit.

7. If NetLibrary elects not to continue to support the Existing Platform at any time due to technological obsolescence or cessation of third party vendor support, NetLibrary may charge Member additional fees for migrating the Audio Books for which Member is paying the Annual Platform Fee to a replacement platform, subject to any applicable limitations as set out on Exhibit A.

##### C. Platform Services

###### 1. Provision and Delivery of Platform Services.

- a. If Member has paid the Platform Fee; then, subject to the terms of this Agreement, Member will receive Platform Services.
- b. Platform Services include:
  - i. establishing and administering Member's NL Website,
  - ii. hosting the Audio Books or Audio Books Collection, as applicable, on Member's NL Website, and
  - iii. providing access - to Member and Patrons - to Member's Audio Books or Audio Books Collection, as applicable, through Member's NL Website.
- c. Member and Patrons will access Platform Services via Member's Internet connection, which will be Member's expense and responsibility.
- d. NetLibrary will provide Platform Services for as long as Member continues to pay the Platform Fee, NetLibrary continues to support the Existing Platform, and Member has not notified NetLibrary to remove the Audio Books from Member's NL Website.
- e. Removing and Reinstating Audio Books.
  - i. Member may elect to have any Audio Books removed from Member's NL Website, by providing NetLibrary with written notice of the election within 60 days of the annualized date on which Platform Fees are calculated and invoiced.
  - ii. Member may elect to have any Audio Books reinstated to Member's NL Website, by providing NetLibrary with written notice of the election within 60 days of the annualized date on which Platform Fees are calculated and invoiced and by paying the applicable Reinstatement Fee as further described in Exhibit A. Platform Fees for reinstated Audio Books are due and payable on the reinstatement date.
- f. Notwithstanding any other provision of this Agreement, if NetLibrary terminates this Agreement for cause under Section II.A.2. of the Agreement, then NetLibrary's obligation to provide Audio Books and Platform Services will expire.

###### 2. Support for NL Website and Member's NL Website.



a. **Existing Platform.** At the time this Agreement is executed, the NL Website, the Member's NL Website, and the Consortium's NL Website are supported by NetLibrary's existing electronic bookshelf technology, which includes a third party operating system, third party database management software, and proprietary NetLibrary software (collectively, the "Existing Platform"). NetLibrary will not charge any fees to continue to support the operation of the Existing Platform, except as may be provided in this Agreement.

b. **Platform Commitment Date.** Initially, the "Platform Commitment" Date will be July 1, 2012. However, NetLibrary may publish or announce a specific date as the Platform Commitment Date or a change in the practice of determining the Platform Commitment Date, provided that the publication or announcement will only be applicable to purchases of Audio Books licenses made after the date of the publication or announcement.

c. **Migration.** If the Existing Platform becomes technologically obsolete and/or third party vendors cease to support third party components of the Existing Platform before the Platform Commitment Date; then, except as may be provided in this Agreement, NetLibrary will not charge Member any additional fees to support the Existing Platform until the Platform Commitment Date or to migrate Member's Audio Books content to a replacement platform before the Platform Commitment Date. If the Existing Platform becomes technologically obsolete and/or third party vendors cease to support third party components of the Existing Platform after the Platform Commitment Date, then NetLibrary may charge fees to support a replacement platform or to migrate Member's Audio Books to a replacement platform.

### 3. **Patron Access.**

Member will implement and maintain Limiting Access Measures, based on NetLibrary's standard systems, which will control Patrons' access to Member's NL Website.

### 4. **Reports.**

Payment of the Platform Fees entitles Member to the standard reports offered by NetLibrary. These reports may be modified by NetLibrary from time to time and may include without limit: current discount schedule, transaction history, owned Audio Books, popular Audio Books, Audio Books not owned, all Audio Books, new Audio Books, activity by subject area and activity by title. Nonstandard reports may be developed for a fee on a case-by-case basis.

## D. **Member and Patron Usage.**

1. **Limiting Access Measures.** Member will be solely responsible for determining which Patrons will have access to Member's NL Website. Member and Consortium will be jointly responsible for determining which Patrons will have access to Consortium's NL Website, as applicable, under this Agreement. Member agrees to implement Limiting Access Measures within a reasonable time frame. NetLibrary, in its sole discretion, may discontinue Member's access to Member's NL Website and Consortium's NL Website, as applicable, if Member fails to implement Limiting Access Measures within a reasonable timeframe. Except for standard fees charged by Member to Patrons, Member will not charge any Patron for use of Member's NL Website.

2. **Terms of Use.** The use of Member's NL Website and Consortium's NL Website, as applicable, by Member and Patrons will be governed by the "Terms of Use" currently available at <http://www.netlibrary.com/TermsOfUse.aspx>, as they may be amended from time to time, which are incorporated in this Agreement by reference. If a Member or a Patron violates the Terms of Use, NetLibrary reserves the right, in its sole discretion, to suspend or terminate Member's or the Patron's access to and use of Member's NL Website and Consortium's NL Website, as applicable. At its sole option, NetLibrary may notify Member of any violation by a Patron of the Terms of Use, and in the event, also at its sole option, NetLibrary may grant Member three days to attempt to correct the violation by a Patron and NetLibrary will not terminate the Patron's access to and use of Member's NL Website and Consortium's NL Website if the violation is corrected within the three day period. Member acknowledges and agrees that, in the case of repeated or persistent violations, NetLibrary may not provide the aforementioned notice and correction period to Member. Repeated or persistent violations of the Terms of Use by Member or Patrons may be cause for termination of this Agreement by NetLibrary.

3. **Tools.** Member will not use, implement or authorize use of any computerized or automated tool or application to search, index, test or otherwise obtain information from Member's NL Website and Consortium's NL Website, as applicable, including without limit any "spidering" or web crawler application (collectively, "Tools"), without obtaining the prior written approval of NetLibrary. NetLibrary will not unreasonably withhold this approval, provided that the proposed use of Tools does not (i) present a risk of interfering with use of NL Website by Patrons or other NetLibrary end-users; (ii) degrade or impair the performance of NL Website; (iii) cause NetLibrary to violate its agreements with its other end-users, its publishers or other third parties; or (iv) constitute a violation of applicable law, including without limit U.S. copyright law. Member acknowledges and agrees that NetLibrary may from time to time implement controls on Member's NL Website to regulate or restrict the use of Tools.

## 4. **Shared Collections.**

a. **Shared Collection(s) Access.** NetLibrary will only permit access to and use of Consortium's Shared Collection(s) by a Consortium Member and the Member's Patrons if: (i) Consortium has executed a Consortium Agreement with NetLibrary, (ii) Consortium has given NetLibrary written notice that Consortium is willing to allow the Member to access a particular Shared Collection, and (iii) the Consortium Member has executed an Agreement. Until all of these conditions have been satisfied, NetLibrary will have no obligation to permit any Member of Consortium to access any Shared Collection of Consortium.

b. **Shared Collection(s) Parameters.** At the time of purchase the Shared Collection closes, NetLibrary will provide access to a Consortium Shared Collection to a Consortium Member that Consortium has authorized to access the Consortium Shared Collection by giving NetLibrary written notice within 30 days after the Consortium Shared Collection closes. NetLibrary will not provide access to a Consortium Shared Collection to any Members that Consortium has not authorized to access the Shared Collection by giving NetLibrary written notice within 30 days after the Shared Collection closes.

## EXHIBIT B TO LIBRARY AGREEMENT FOR AUDIO BOOK PURCHASES -- GUIDELINES FOR THE USE AND TRANSFER OF OCLC-DERIVED RECORDS

Revision of November 16, 1987

## I. GUIDELINES

(See Definitions in Part II below)

1. Each member and nonmember library may use records without restriction, and may transfer records of its own holdings without restriction to other libraries.
2. In addition to transfers to libraries, each member and nonmember library may transfer records of its own holdings without restriction, to (a) member networks, (b) state and multi-state library agencies and (c) all other noncommercial firms.
  - a. Member networks may produce and transfer to any member library, copies on magnetic tape of records used or inserted into the OCLC database by the library. Each member network also may process records of the holdings of any member or nonmember library which has employed and agreed to pay it for that service, provided the member network has first signed either an individual agreement with the library, or a general agreement with OCLC, containing measures agreed upon by OCLC and the member network for protection of the records it has been employed to process. Any other use and transfer of records by member networks will be as provided in separate understandings with OCLC.
  - b. The use and transfer of records by library systems or projects operated by or under the aegis of one or more state or national library agencies will be as provided in separate understandings with OCLC. Such understandings may include (i) arrangements to incorporate state or national bibliographic databases into the OCLC system, (ii) paid-up licenses to use records in state or national programs (e.g., by means of payments for OCLC multi-institution tapes) and/or (iii) any other understandings that will facilitate state or national programs as well as the maintenance and enhancement of the OCLC database.
  - c. The use and transfer of records by any other organizations to which transfers are made under this Guideline 2 will be as provided in separate understandings with OCLC.
3. In addition, each member and nonmember library may transfer records of its own holdings to commercial firms which the library has employed and agreed to pay to process such records, provided that each commercial firm has first signed an individual agreement with the library, or OCLC has advised the library that the commercial firm has signed a general agreement with OCLC, in either case containing measures agreed upon by OCLC and the commercial firm for protection of the records it has been employed to process. In addition, each member and nonmember library may make any other transfers of records to commercial firms, subject to prior written agreements with OCLC. However, there is no requirement for prior written agreements (a) for transfers made under Guideline 1 above to libraries operated by commercial firms or (b) for transfers to commercial firms by former OCLC member libraries of records of their holdings, so long as the libraries maintain no continuing user status with OCLC.
4. When a nonmember organization makes bibliographic information available to OCLC which is subject to usage or transfer restrictions imposed by such nonmember organization, and OCLC nevertheless elects to accept the information for addition to the OCLC database, OCLC will notify libraries to which it makes the information available, and rights to use and transfer records based on such information will be subject to the same restrictions.
5. When transfers under Guideline 1 above are made to machine-readable union catalogs accessible by nonmember libraries, it is requested that machine-readable copies of the records of such union catalogs be submitted to OCLC. OCLC, at its own expense, will have the right to add such records to its database for all uses consistent with its chartered purposes.
6. The Guidelines above apply to all uses and transfers of records except where a mutually acceptable agreement establishing broader or narrower rights is made with OCLC relating to a specific product or service.

## II. DEFINITIONS

1. The term "member library" means a general member of OCLC as defined in its Code of Regulations.
2. The term "nonmember library" means any library other than a member library.
3. A "member network" is an OCLC-affiliated regional, state or multi-state library network organization which is in contract with OCLC to provide OCLC services and products, or to assist OCLC to provide such services and products, to general members of OCLC.
4. A "commercial firm" is any organization permitted, under applicable law, to operate on a for-profit basis.
5. The term "records" means bibliographic records and holdings data (including copies thereof) derived from the OCLC database, including derivative works made from such records, and either received in machine-readable form or converted by the transferee into machine-readable form. The term also includes such records when held only in eye-readable form, in the case of proposed transfers to commercial firms. However, records do not include, as to any member or nonmember library (a) bibliographic records designated in the OCLC database as original cataloging by such member or nonmember library and (b) bibliographic records derived by such member or nonmember library from sources other than the OCLC database and to copies of which in the OCLC database its holdings symbol has been attached by tape-loading. Such excluded records are freely transferable and are not dealt with in these Guidelines. OCLC-derived records held only in eye-readable form are freely transferable except to commercial firms.
6. The terms "transfer" and "transfer of records" refer to all sales, exchanges, gifts, sharing and other transfers, and all online access except online access provided to end-user patrons of a library in authorized possession of the records.



Form Consortium Agreement (Domestic - S&U) 08.08.03  
BCR Consortium Audio Book Purchase Agreement- 3.29.07  
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15 of 15

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**LIBRARY AGREEMENT FOR AUDIO BOOK PURCHASES**  
**BCR MEMBER TERMS AND CONDITIONS**

Library Agreement for Audio Book Purchases .....	1
I. DEFINITIONS; AUDIO BOOK LICENSES .....	1
A. Definitions .....	1
B. Audio Book Licenses .....	1
II. GENERAL PROVISIONS .....	2
A. Termination .....	2
B. Limited Warranty .....	2
C. Warranty Disclaimer .....	2
D. Indemnity .....	2
E. Limitation on Liability .....	2
F. Confidential Information .....	3
G. Payment Terms .....	3
H. Other Provisions .....	3
Exhibit A to Library Agreement for Audio Book Purchases – Platform Fee .....	4
A. Definitions .....	4
B. Annual Platform Fee .....	4
C. Platform Services .....	4
D. Member and Patron Usage .....	5
Exhibit B to Library Agreement for Audio Book Purchases – Guidelines for the Use and Transfer of OCLC-Derived Records .....	6

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed by their duly authorized representatives, to be effective as of the Effective Date, as set forth below.

Member:	Member Name	NetLibrary:	NetLibrary, a division of OCLC Online Computer Library Center, Inc.
By:		By:	
Name:	Name of Authorized Signatory	Name:	Rick Schwieterman
Title:	Title of Authorized Signatory	Title:	Vice President and Chief Financial Officer
Date:		Date:	

THIS LIBRARY AGREEMENT FOR AUDIO BOOK PURCHASES (this "Agreement") is by and between Member Name, ("Member") and NetLibrary, a division of OCLC Online Computer Library Center, Inc., an Ohio nonprofit corporation ("NetLibrary").

WHEREAS, NetLibrary has acquired certain rights to convert various books and other works to electronic format and to market and distribute the works as converted as Audio Books, and NetLibrary operates an electronic library service for hosting and managing Audio Books and other materials over the Internet.

WHEREAS, NetLibrary and BCR ("Consortium") have entered into a consortium Audio Book agreement (the "Consortium Audio Book Agreement").

WHEREAS, Consortium has given NetLibrary written notice that Consortium is willing to allow Member to access a particular Shared Collection and Member has been designated a "Member" of Consortium as defined in the Consortium Audio Book Agreement (for clarification, capitalized terms used herein and not defined herein will have the meanings assigned to them in the applicable Consortium Audio Book Agreement).

WHEREAS, Member desires to purchase licenses to certain Audio Books, as part of the discrete Shared or Unique Collection; subject to the terms and conditions described in this Agreement.

IN CONSIDERATION OF THE MUTUAL COVENANTS AND OBLIGATIONS SET FORTH BELOW, the parties agree as follows.

**I. DEFINITIONS; AUDIO BOOK LICENSES**

**A. Definitions.**

Terms defined within this Agreement have the respective meanings attributed to them throughout this Agreement or in this Section I.A. Any defined term may be used in the singular and in the plural, as appropriate in the context.

1. "Audio Books" mean NetLibrary's electronic versions of certain Audio Books and other works in which NetLibrary has acquired certain rights.
2. The "Audio Books License" means a license to use the relevant Audio Books(s).
3. The "Audio Books License Fee" means a one-time-only fee for Member's license to use the relevant Audio Books(s) and is determined by subtracting the applicable Discount from the Audio Books List Price.
4. The "Audio Books List Price" means the price established by NetLibrary for the license to use the relevant Audio Books(s).
5. "Discount" means the percentage of the Audio Books List Price used in determining the Audio Books License Fee. Discounts do not apply to Platform Services.
6. The "Effective Date" of this Agreement means the latest execution date set forth on the signature block below or the date on which Member or any Patron may first access Audio Books, whichever date occurs first.
7. "Member's NL Website" means the Website operated by NetLibrary and open to Member and Patrons in order to access and use Audio Books licensed to Member.



8. A "MARC Record" means an electronic record containing metadata and other relevant information about the corresponding Audio Book.

9. "NL Website" means the Website operated by NetLibrary and open to the general public in order to provide information about NetLibrary's products and services.

10. "Patrons" mean Member's registered faculty, members, patrons, students, and other authorized users, including both onsite users and remote users. Patrons are individuals and may not be corporations or other entities.

11. The "Shared Collection(s)" means a collection(s) of Audio Books licensed to Consortium for access and use by Consortium and its participating Members and Patrons (as such terms are defined in the applicable Consortium Audio Book Agreement) under the terms and conditions of the Consortium Audio Book Agreement with respect to Shared Collection(s) and this Agreement; nothing in this Agreement is intended to grant Member any rights in the Shared Collection(s) without completion of appropriate paperwork and payment of related fees.

12. Subject to Section II.A below, the "Term" of this Agreement includes an "Initial Term," which commences on the Effective Date and continues in effect for one year, and any "Renewal Term(s)," which are automatic one year extensions of this Agreement that commence on each anniversary of the Effective Date unless this Agreement is terminated according to Section II.A.1 below.

13. A "Unique Collection" means a collection of Audio Books chosen by a Member and licensed to the Member under the terms and conditions of this Agreement. The Unique Collection remains separate from the Shared Collection(s). The Unique Collection is only accessible by Member and its Patrons; the Unique Collection is not accessible by Consortium or by nonpurchasing Members and Patrons (as such terms are defined in the applicable Consortium Audio Book Agreement).

#### B. Audio Book Licenses.

##### 1. Purchase of Licenses.

###### a. Audio Books.

i. During the Term of the Agreement, Member may select and purchase Audio Book Licenses in accordance with NetLibrary's then current ordering practices. NetLibrary will make the Audio Books Licenses available to Member according to NetLibrary's agreements with its content providers, and partners. Each final order of Audio Book Licenses is incorporated in this Agreement by reference.

ii. Member designates Consortium as its agent for acquiring rights to Audio Books on behalf of Member under the Consortium Audio Book Agreement and with the authority to act, including without limit ordering Audio Books, on behalf of Member under this Agreement and the Consortium Audio Book Agreement. NetLibrary is authorized to rely on this designation and to recognize Consortium as an agent of Member. Member agrees to comply with and be bound by all the provisions of the Consortium Audio Book Agreement applicable to "Members" as defined in the Consortium Audio Book Agreement.

b. **MARC Records.** As part of the relevant Platform Fee; NetLibrary will provide Member with one copy of the MARC Record that corresponds to each Audio Books License purchased by Member for the Unique Collection. NetLibrary and Member agree that all MARC Records are the property of OCLC; Member may use MARC Records only for its own internal purposes as further described in Exhibit B. NetLibrary will replace defective MARC Records if Member notifies NetLibrary of the defect within 90 days of NetLibrary's delivery of the MARC Record to Member and NetLibrary concurs that the MARC Record is defective.

2. **Copyrighted Works.** Member acknowledges and agrees that the copyright to each Audio Book is owned by or licensed to NetLibrary and the respective publisher thereof. All Rights Reserved. By purchasing a license to an Audio Book, Member

obtains certain rights to access and use a copy of the Audio Book under this Agreement, but Member does not obtain or own any rights in the copyrights or any other intellectual property rights that may be associated with the Audio Book. Member agrees that it is responsible for all use of Audio Books by Member and its Patrons, and that any use of Audio Books by Member and its Patrons is governed by and will comply with applicable laws, including without limit U.S. copyright laws. Member acknowledges that it and its Patrons have no right to make copies of any Audio Book, or any portions thereof, except to the extent permitted by applicable copyright laws and neither it nor Patrons have any right to grant any third parties the right to use any Audio Book (for purposes of this sentence, third parties does not include Patrons).

#### II. GENERAL PROVISIONS

##### A. Termination.

1. **Termination Without Cause.** Either party may terminate this Agreement without cause effective upon the conclusion of the then current Initial Term or Renewal Term, as applicable, by providing the other party with at least 60 days prior written notice of its intent to do so.

2. **Termination for Cause.** Either party may terminate this Agreement for cause at any time by providing the other party with prior written notice of the occurrence of any of the following events:

- a party fails to timely pay any amounts due and payable, provided that the nonpayment is not cured within 10 days of the notice; or
- a party violates any material provision of this Agreement, including without limit a material failure to provide required services, a breach by Member or Patrons of copyrights laws, failure to comply with any security documents or a breach of the confidentiality provisions of this Agreement, or otherwise has committed breaches of this Agreement that, in the aggregate, are material, provided that the breach(es) cannot be, or is(are) not, cured within 60 days of the notice.

3. **Survival.** All terms of this Agreement that are intended to survive termination for any reason of this Agreement will so survive, including without limit Section I.B.2; Section(s) II.B, C, D, E, F, G, H.5 and H.13; and Section D of Exhibit A.

##### B. Limited Warranty.

NetLibrary warrants that, as to any Audio Books licensed to Member under this Agreement, NetLibrary has the necessary authority to license the Audio Books to Member and to provide Platform Services to Member. NetLibrary warrants that it will use its commercially reasonable efforts to provide Platform Services as described in this Agreement.

##### C. Warranty Disclaimer.

EXCEPT AS EXPRESSLY PROVIDED IN SECTION II.B ABOVE, MEMBER'S NL WEBSITE, PLATFORM SERVICES, AND AUDIO BOOKS LICENSED UNDER THIS AGREEMENT ARE PROVIDED "AS IS" WITHOUT ANY WARRANTY OF ANY KIND AND NETLIBRARY, ITS CONTENT PROVIDERS, AND CONSORTIUM EXPRESSLY DISCLAIM ALL IMPLIED WARRANTIES, INCLUDING WITHOUT LIMIT THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE. NEITHER NETLIBRARY, ITS CONTENT PROVIDERS, NOR CONSORTIUM WARRANTS, GUARANTEES OR MAKES ANY REPRESENTATIONS REGARDING THE USE, OR THE RESULTS OF THE USE, OF MEMBER'S NL WEBSITE OR AUDIO BOOKS. NO ORAL OR WRITTEN INFORMATION OR ADVICE GIVEN BY NETLIBRARY OR CONSORTIUM OR EMPLOYEES OF EITHER PARTY WILL CREATE A REPRESENTATION OR WARRANTY OR IN ANY WAY INCREASE THE SCOPE OF NETLIBRARY'S OBLIGATIONS, AND MEMBER MAY NOT RELY ON ANY SUCH INFORMATION OR ADVICE.

##### D. Indemnity.

NetLibrary will defend, indemnify, and hold Member harmless from any action based solely on a claim that Audio Books furnished and used within the scope of this Agreement infringe any copyright of



any third party, except that this indemnity will not apply to copyright claims arising from content that has been provided to NetLibrary by publishers and is provided by NetLibrary without substantive modification (except for conversion to digital format). Member will defend, indemnify, and hold NetLibrary harmless from any action based on a claim that the use by Member or its Patrons of Member's NL Website, Consortium's NL Website or Audio Books in violation of the terms of this Agreement infringes any copyrights or trade secrets of any third party.

**E. Limitation on Liability.**

Neither party will claim special, incidental, indirect, or consequential damages, including without limit lost profits, for breach of this Agreement. This limitation will also apply to any claims brought against NetLibrary's content providers. Remedies are limited to claims for amounts due, for injunctive relief only as provided, or for direct damages. A party's aggregate liability for any and all claims, losses, liabilities, and demands arising, whether for breach of contract, in tort or otherwise, are limited to the total amount of eAudio Book License Fees, and Platform Fees (collectively, "Fees") paid by Member to NetLibrary, during the 12 month period immediately preceding the date on which the claim first arose. Notwithstanding any other provision of this Agreement, the nonbreaching party may seek injunctive relief in any court of competent jurisdiction to enjoin or restrain the breaching party from continuing to do any act or commit any violation or threatened violation of this Agreement, and the prevailing party, if any, on a claim for injunctive relief is entitled to recover its reasonable attorney fees incurred in connection with that proceeding. Injunctive relief will be without prejudice to the nonbreaching party's right to also seek money damages for breach of this Agreement.

**F. Confidential Information.**

To the extent allowed by applicable law, Member agrees that it will not use or disclose information relating to (i) the terms of this Agreement, (ii) the content of reports delivered under this Agreement, (iii) pricing terms and other business arrangements governed by this Agreement and (iv) any other documents provided by NetLibrary that have a confidential, proprietary or other similar designation or should reasonably be believed to be the confidential or proprietary information of NetLibrary or its content providers. Notwithstanding the foregoing, Member may disclose the aggregated content of reports delivered under Ex.A.C.4 to other library professionals.

**G. Payment Terms.**

At NetLibrary's discretion, either NetLibrary or Consortium may invoice Member for any fees and other charges due for the purchase of Member's Unique Collection(s) under this Agreement. Consortium will bill Member for amounts due with respect to Shared Collections. All fees and charges are due and payable 30 days from the date of the related invoice. NetLibrary or Consortium has the right to charge 1.5% interest per month on any invoice that remains unpaid longer than 30 days from the date of the invoice; in addition, NetLibrary may deny Member and Patrons access to Member's NL Website or Consortium's NL Website until the unpaid invoice is paid in full.

**H. Other Provisions.**

1. **Entire Agreement.** All exhibits referred to in this Agreement are incorporated in this Agreement by reference. Any modification or amendment to Section(s) B. and C of Exhibit A under Section II.H.2 below will also be incorporated in this Agreement by reference. This Agreement sets forth the entire agreement between the parties with respect to the subject matter of the Agreement, merges all discussions between them and supercedes and replaces any and every other prior or contemporaneous agreement, understanding or negotiation that may have existed between NetLibrary and Member to the extent that any such agreement relates to the subject matter of the Agreement. This Agreement governs all orders for Audio Books and Platform Services placed by Member during the Term.

2. **Modification or Amendment.** Notwithstanding any other provision in this Agreement, NetLibrary will have the right to modify and

amend Section(s) B. and C of Exhibit A to this Agreement provided that NetLibrary provides Member with at least 30 days prior written notice; and, in this event, the modified or amended Exhibit(s) will not be effective before the end of the 30 day notice period. Any other modification or amendment of this Agreement must be in writing and signed by a duly authorized representative of each party. For clarification, no term contained in a purchase order or other similar document submitted to NetLibrary by Member will become binding on the parties unless and until the term is mutually agreed upon in a written modification or amendment to this Agreement as described above.

3. **Assignment.** Neither party may sell, assign, transfer or convey this Agreement or any rights and obligations without the prior written consent of the other party, which will not be unreasonably withheld. Notwithstanding the foregoing, NetLibrary reserves the right to assign or transfer this Agreement to an affiliated company or to a third party that acquires substantially all of its assets upon written notice to the Member.

4. **Successors and Assigns.** This Agreement will be binding upon and inure to the benefit of the parties and their respective permitted successors and assigns.

5. **Governing Law, Jurisdiction and Venue.** This Agreement will be governed by the laws of the State of Colorado, U.S.A. without regard to any conflict of laws provisions contained in this Agreement. NetLibrary and Member agree that any action arising from or out of the negotiations, execution, interpretation or enforcement of this Agreement may be brought in the state or federal courts located in the State of Colorado, U.S.A. Member hereby consents to jurisdiction and venue in the state and federal courts in Colorado, U.S.A.

6. **Interpretation.** The use of headings in this Agreement is solely for the mutual convenience of the parties and will not affect the construction.

7. **Severability.** If any provision of this Agreement proves to be illegal, invalid or unenforceable, the remainder of this Agreement will not be affected thereby, and in lieu of any provision of this Agreement that is illegal, invalid or unenforceable, there will be added as a part of this Agreement a provision as similar in terms to the illegal, invalid or unenforceable provision as may be possible to be legal, valid and enforceable.

8. **Further Assurances.** Member and NetLibrary agree to take the further actions and to execute the further documents as may be necessary or appropriate to effectuate this Agreement and the transactions contemplated in this Agreement.

9. **Force Majeure.** Member acknowledges that the Internet is an unsecure, unstable, unregulated, unorganized and unreliable environment, and that the ability of NetLibrary to deliver Platform Services may depend upon the Internet and equipment, software, systems, data and services provided by various telecommunications carriers, equipment manufacturers, firewall providers, encryption system developers and other vendors and third parties. Neither party will be liable for, or have the right to terminate this Agreement as a result of, any delays or failures to perform any of its obligations under the Agreement to the extent that the delays or failures are due to circumstances beyond its reasonable control, including without limit acts of God; strikes; riots; acts of war; power failures; and functions or malfunctions of the Internet, telecommunications services, firewalls, encryption systems, and security devices; or governmental regulations imposed after the Effective Date.

10. **Waiver.** The waiver by either party of any right granted under this Agreement will not be deemed a waiver of any other right granted under this Agreement, or a precedent for any subsequent waiver.

11. **No Partnership.** As to one another the parties are considered independent contractors. It is not the intention of the parties to create, nor will this Agreement be construed as creating, a partnership, joint venture, agency relationship, or other association; or render the parties liable as partners, co-venturers, agents, or principals.



12. **No Third Party Beneficiaries.** This Agreement is not intended to confer any benefit on any person or entity not a party to this Agreement.
13. **Notices.** Any notice, demand, request, consent, approval or other communication (collectively, "Notices") required or permitted to be given under this Agreement will be in writing and sent by hand delivery, special courier capable of confirming receipt, United States Mail (certified mail, return receipt requested), or facsimile or e-mail to a non-individual-specific e-mail address if receipt is confirmed. The parties acknowledge and agree that a Notice might not be deemed effective if receipt is not confirmed. Notices will be deemed given under the following rules: if hand delivered, at the time of delivery; if sent by special courier, on the third day after delivery to the courier; if mailed, on the seventh day after deposit in the United States Mail; and if sent by facsimile or e-mail to a non-individual-specific e-mail address, on the date transmitted if the sender receives confirmation that the transmission was received during the notified party's normal business hours, otherwise on the notified party's next normal business day. Notices will be sent to the following addresses:

	If to NL:	If to Member:
	NetLibrary, a division of OCLC Online Computer Library Center, Inc.	Member Name
Address:	4888 Pearl East Circle, Suite 103	Member Address
Address:	Boulder, Colorado 80301	Member Address
Attention:	Sales Management	Name of Person or Department to whom Notice should be sent
Telephone:	(303) 415-2548	Member Telephone Number
Facsimile:	(303) 381-8600	Member Fax Number
e-mail address:	sales@netlibrary.com	Member Email Address

14. **Facsimile Copies.** A copy of the signed original of this Agreement transmitted by facsimile machine will be binding on both parties and have the same force and effect as the signed original.

#### EXHIBIT A TO LIBRARY AGREEMENT FOR AUDIO BOOK PURCHASES – PLATFORM FEE

##### A. Definitions.

1. **"Limiting Access Measures"** mean appropriate measures to limit the use of Audio Books through access by Patrons. Limiting Access Measures are to comply with NetLibrary's reasonable application requirements which may change from time to time and may include, but are not limited to, remote patron authentication applications, authentication through protected IP addresses, a patterned identification check and privileged user accounts. NetLibrary will consider other Limiting Access Measures on a case-by-case basis, but may reject the proposed methods if, in NetLibrary's opinion, access will not be sufficiently controlled.
2. **"Platform Fee"** means the fee Member pays to maintain Member's NL Website and to maintain and upgrade the Existing Platform and bandwidth. Platform Fees include Platform Services. Member may pay the Platform Fee on the basis described in this Exhibit A.
3. **"Platform Services"** mean NetLibrary's services related to Member's ongoing access to and use of Audio Books or Subscription(s) to Audio Books via the Internet and Member's NL Website, as further described in this Exhibit A.
3. The **"Reinstatement Fee"** means the fee associated with reinstating Platform Services for an Audio Book for which Platform Services were previously terminated, as further described in this Exhibit A.

##### B. Annual Platform Fee.

1. The Annual Platform Fee for an order will equal 10% of the Audio Book List Price(s) for all the Audio Book(s) in the order at the time of initial licensing.
2. Upon payment of an Annual Platform Fee, NetLibrary will host and provide Platform Services for the effected Audio Books for 1 year from the purchase date.
3. The first payment of the Annual Platform Fee for an order will be due and payable at the time the Member purchases the Audio Book Licenses, and will be included on the invoice for the corresponding Audio Book License Fees.
4. NetLibrary will calculate and Invoice Annual Platform Fees for the second and subsequent years on an annualized basis on a single date each year.
5. The Reinstatement Fee for an Audio Book will equal 10% of the Audio Book List Price.

6. The Annual Platform Fee in the second and subsequent years will be reduced by the portion of the first year Annual Platform Fee attributable to any Audio Book removed from, and not reinstated to, Member's Audio Book collection as further described in this Exhibit A.
7. If NetLibrary elects not to continue to support the Existing Platform at any time due to technological obsolescence or cessation of third party vendor support, NetLibrary may charge Member additional fees for migrating the Audio Books for which Member is paying the Annual Platform Fee to a replacement platform, subject to any applicable limitations as set out on Exhibit A.

##### C. Platform Services

1. **Provision and Delivery of Platform Services.**
  - a. If Member has paid the Platform Fee; then, subject to the terms of this Agreement, Member will receive Platform Services.
  - b. Platform Services include:
    - i. establishing and administering Member's NL Website,
    - ii. hosting the Audio Books or Audio Books Collection, as applicable, on Member's NL Website, and
    - iii. providing access - to Member and Patrons - to Member's Audio Books or Audio Books Collection, as applicable, through Member's NL Website.
  - c. Member and Patrons will access Platform Services via Member's Internet connection, which will be Member's expense and responsibility.
  - d. NetLibrary will provide Platform Services for as long as Member continues to pay the Platform Fee, NetLibrary continues to support the Existing Platform, and Member has not notified NetLibrary to remove the Audio Books from Member's NL Website.
  - e. **Removing and Reinstating Audio Books.**
    - i. Member may elect to have any Audio Books removed from Member's NL Website, by providing NetLibrary with written notice of the election within 60 days of the annualized date on which Platform Fees are calculated and invoiced.
    - ii. Member may elect to have any Audio Books reinstated to Member's NL Website, by providing NetLibrary with written notice of the election within 60 days of the annualized date on which Platform Fees are calculated and invoiced and by

paying the applicable Reinstatement Fee as further described in Exhibit A. Platform Fees for reinstated Audio Books are due and payable on the reinstatement date.

- f. Notwithstanding any other provision of this Agreement, if NetLibrary terminates this Agreement for cause under Section II.A.2. of the Agreement, then NetLibrary's obligation to provide Audio Books and Platform Services will expire.

**2. Support for NL Website and Member's NL Website.**

a. **Existing Platform.** At the time this Agreement is executed, the NL Website, the Member's NL Website, and the Consortium's NL Website are supported by NetLibrary's existing electronic bookshelf technology, which includes a third party operating system, third party database management software, and proprietary NetLibrary software (collectively, the "Existing Platform"). NetLibrary will not charge any fees to continue to support the operation of the Existing Platform, except as may be provided in this Agreement.

b. **Platform Commitment Date.** Initially, the "Platform Commitment" Date will be July 1, 2012. However, NetLibrary may publish or announce a specific date as the Platform Commitment Date or a change in the practice of determining the Platform Commitment Date, provided that the publication or announcement will only be applicable to purchases of Audio Books licenses made after the date of the publication or announcement.

c. **Migration.** If the Existing Platform becomes technologically obsolete and/or third party vendors cease to support third party components of the Existing Platform before the Platform Commitment Date; then, except as may be provided in this Agreement, NetLibrary will not charge Member any additional fees to support the Existing Platform until the Platform Commitment Date or to migrate Member's Audio Books content to a replacement platform before the Platform Commitment Date. If the Existing Platform becomes technologically obsolete and/or third party vendors cease to support third party components of the Existing Platform after the Platform Commitment Date, then NetLibrary may charge fees to support a replacement platform or to migrate Member's Audio Books to a replacement platform.

**3. Patron Access.**

Member will implement and maintain Limiting Access Measures, based on NetLibrary's standard systems, which will control Patrons' access to Member's NL Website.

**4. Reports.**

Payment of the Platform Fees entitles Member to the standard reports offered by NetLibrary. These reports may be modified by NetLibrary from time to time and may include without limit: current discount schedule, transaction history, owned Audio Books, popular Audio Books, Audio Books not owned, all Audio Books, new Audio Books, activity by subject area and activity by title. Nonstandard reports may be developed for a fee on a case-by-case basis.

**D. Member and Patron Usage.**

1. **Limiting Access Measures.** Member will be solely responsible for determining which Patrons will have access to Member's NL Website. Member and Consortium will be jointly responsible for determining which Patrons will have access to Consortium's NL Website, as applicable, under this Agreement. Member agrees to implement Limiting Access Measures within a reasonable time frame. NetLibrary, in its sole discretion, may discontinue Member's access to Member's NL Website and Consortium's NL

Website, as applicable, if Member fails to implement Limiting Access Measures within a reasonable timeframe. Except for standard fees charged by Member to Patrons, Member will not charge any Patron for use of Member's NL Website.

2. **Terms of Use.** The use of Member's NL Website and Consortium's NL Website, as applicable, by Member and Patrons will be governed by the "Terms of Use" currently available at <http://www.netlibrary.com/TermsOfUse.aspx>, as they may be amended from time to time, which are incorporated in this Agreement by reference. If a Member or a Patron violates the Terms of Use, NetLibrary reserves the right, in its sole discretion, to suspend or terminate Member's or the Patron's access to and use of Member's NL Website and Consortium's NL Website, as applicable. At its sole option, NetLibrary may notify Member of any violation by a Patron of the Terms of Use, and in the event, also at its sole option, NetLibrary may grant Member three days to attempt to correct the violation by a Patron and NetLibrary will not terminate the Patron's access to and use of Member's NL Website and Consortium's NL Website if the violation is corrected within the three day period. Member acknowledges and agrees that, in the case of repeated or persistent violations, NetLibrary may not provide the aforementioned notice and correction period to Member. Repeated or persistent violations of the Terms of Use by Member or Patrons may be cause for termination of this Agreement by NetLibrary.

3. **Tools.** Member will not use, implement or authorize use of any computerized or automated tool or application to search, index, test or otherwise obtain information from Member's NL Website and Consortium's NL Website, as applicable, including without limit any "spidering" or web crawler application (collectively, "Tools"), without obtaining the prior written approval of NetLibrary. NetLibrary will not unreasonably withhold this approval, provided that the proposed use of Tools does not (i) present a risk of interfering with use of NL Website by Patrons or other NetLibrary end-users; (ii) degrade or impair the performance of NL Website; (iii) cause NetLibrary to violate its agreements with its other end-users, its publishers or other third parties; or (iv) constitute a violation of applicable law, including without limit U.S. copyright law. Member acknowledges and agrees that NetLibrary may from time to time implement controls on Member's NL Website to regulate or restrict the use of Tools.

**4. Shared Collections.**

a. **Shared Collection(s) Access.** NetLibrary will only permit access to and use of Consortium's Shared Collection(s) by a Consortium Member and the Member's Patrons if: (i) Consortium has executed a Consortium Agreement with NetLibrary, (ii) Consortium has given NetLibrary written notice that Consortium is willing to allow the Member to access a particular Shared Collection, and (iii) the Consortium Member has executed an Agreement. Until all of these conditions have been satisfied, NetLibrary will have no obligation to permit any Member of Consortium to access any Shared Collection of Consortium.

b. **Shared Collection(s) Parameters.** At the time of purchase the Shared Collection closes. NetLibrary will provide access to a Consortium Shared Collection to a Consortium Member that Consortium has authorized to access the Consortium Shared Collection by giving NetLibrary written notice within 30 days after the Consortium Shared Collection closes. NetLibrary will not provide access to a Consortium Shared Collection to any Members that Consortium has not authorized to access the Shared Collection by giving NetLibrary written notice within 30 days after the Shared Collection closes.



## EXHIBIT B TO LIBRARY AGREEMENT FOR AUDIO BOOK PURCHASES - GUIDELINES FOR THE USE AND TRANSFER OF OCLC-DERIVED RECORDS

Revision of November 16, 1987

## I. GUIDELINES

(See Definitions in Part II below)

1. Each member and nonmember library may use records without restriction, and may transfer records of its own holdings without restriction to other libraries.
2. In addition to transfers to libraries, each member and nonmember library may transfer records of its own holdings without restriction, to
  - (a) member networks, (b) state and multi-state library agencies and (c) all other noncommercial firms.
    - a. Member networks may produce and transfer to any member library, copies on magnetic tape of records used or inserted into the OCLC database by the library. Each member network also may process records of the holdings of any member or nonmember library which has employed and agreed to pay for that service, provided the member network has first signed either an individual agreement with the library, or a general agreement with OCLC, containing measures agreed upon by OCLC and the member network for protection of the records it has been employed to process. Any other use and transfer of records by member networks will be as provided in separate understandings with OCLC.
    - b. The use and transfer of records by library systems or projects operated by or under the aegis of one or more state or national library agencies will be as provided in separate understandings with OCLC. Such understandings may include (i) arrangements to incorporate state or national bibliographic databases into the OCLC system, (ii) paid-up licenses to use records in state or national programs (e.g., by means of payments for OCLC multi-institution tapes) and/or (iii) any other understandings that will facilitate state or national programs as well as the maintenance and enhancement of the OCLC database.
    - c. The use and transfer of records by any other organizations to which transfers are made under this Guideline 2 will be as provided in separate understandings with OCLC.
3. In addition, each member and nonmember library may transfer records of its own holdings to commercial firms which the library has employed and agreed to pay to process such records, provided that each commercial firm has first signed an individual agreement with the library, or OCLC has advised the library that the commercial firm has signed a general agreement with OCLC, in either case containing measures agreed upon by OCLC and the commercial firm for protection of the records it has been employed to process. In addition, each member and nonmember library may make any other transfers of records to commercial firms, subject to prior written agreements with OCLC. However, there is no requirement for prior written agreements (a) for transfers made under Guideline 1 above to libraries operated by commercial firms or (b) for transfers to commercial firms by former OCLC member libraries of records of their holdings, so long as the libraries maintain no continuing user status with OCLC.

4. When a nonmember organization makes bibliographic information available to OCLC which is subject to usage or transfer restrictions imposed by such nonmember organization, and OCLC nevertheless elects to accept the information for addition to the OCLC database, OCLC will notify libraries to which it makes the information available, and rights to use and transfer records based on such information will be subject to the same restrictions.
5. When transfers under Guideline 1 above are made to machine-readable union catalogs accessible by nonmember libraries, it is requested that machine-readable copies of the records of such union catalogs be submitted to OCLC. OCLC, at its own expense, will have the right to add such records to its database for all uses consistent with its chartered purposes.
6. The Guidelines above apply to all uses and transfers of records except where a mutually acceptable agreement establishing broader or narrower rights is made with OCLC relating to a specific product or service.

## II. DEFINITIONS

1. The term "member library" means a general member of OCLC as defined in its Code of Regulations.
2. The term "nonmember library" means any library other than a member library.
3. A "member network" is an OCLC-affiliated regional, state or multi-state library network organization which is in contract with OCLC to provide OCLC services and products, or to assist OCLC to provide such services and products, to general members of OCLC.
4. A "commercial firm" is any organization permitted, under applicable law, to operate on a for-profit basis.
5. The term "records" means bibliographic records and holdings data (including copies thereof) derived from the OCLC database, including derivative works made from such records, and either received in machine-readable form or converted by the transferee into machine-readable form. The term also includes such records when held only in eye-readable form, in the case of proposed transfers to commercial firms. However, records do not include, as to any member or nonmember library (a) bibliographic records designated in the OCLC database as original cataloging by such member or nonmember library and (b) bibliographic records derived by such member or nonmember library from sources other than the OCLC database and to copies of which in the OCLC database its holdings symbol has been attached by tapeloading. Such excluded records are freely transferable and are not dealt with in these Guidelines. OCLC-derived records held only in eye-readable form are freely transferable except to commercial firms.
6. The terms "transfer" and "transfer of records" refer to all sales, exchanges, gifts, sharing and other transfers, and all online access except online access provided to end-user patrons of a library in authorized possession of the records.

# **EXHIBIT 5**



## CONSORTIUM AGREEMENT FOR AUDIO BOOK PURCHASES

ORIGINAL

Consortium Agreement for Audio Book Purchases	1
I. DEFINITIONS; AUDIO BOOK LICENSES	1
A. Definitions	1
B. Audio Book Licenses	1
II. GENERAL PROVISIONS	2
A. Termination	2
B. Limited Warranty	2
C. Warranty Disclaimer	2
D. Indemnity	3
E. Limitation on Liability	3
F. Confidential Information	3
G. Payment Terms	3
H. Other Provisions	3
Exhibit A to Consortium Agreement for Audio Book Purchases - Platform Fee	3
A. Definitions	4
B. Annual Platform Fee	4
C. Platform Services	4
D. Consortium and Patron Usage	5
Exhibit B to Consortium Agreement for Audio Book Purchases - Guidelines for the Use and Transfer of OCLC-Derived Records	7
Exhibit C to Consortium Agreement for Audio Book Purchases - Consortium's Members	8
Exhibit D to Consortium Agreement for Audio Book Purchases - Commercial Terms for Solinet Shared Collection #1	9
Exhibit E to Consortium Agreement for Audio Book Purchases - Library Audio Book Agreement	10
Exhibit F to Consortium Agreement for Audio Book Purchases - SOLINET Subscriber Agreement	16

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed by their duly authorized representatives, to be effective as of the Effective Date, as set forth below.

Consortium: Southeastern Library Network, Inc.  
(Solinet)

By:

Name:

Title:

Date:

*Natalie M. Chare*  
NATALIE M. CHARE

CFO

4.16.2007

NetLibrary:

NetLibrary, a Division of OCLC Online  
Computer Library Center, Inc.

By:

Name:

Title:

Date:

Rick Schwietzman

Vice President and Chief Financial  
Officer5-1  
2007

THIS CONSORTIUM AGREEMENT FOR AUDIO BOOK PURCHASES (this "Agreement") is by and between the Southeastern Library Network, Inc., a Louisiana nonprofit corporation ("Consortium") and NetLibrary, a division of OCLC Online Computer Library Center, Inc., an Ohio nonprofit corporation ("NetLibrary").

WHEREAS, NetLibrary has acquired certain rights to convert various books and other works to electronic format and to market and distribute the works as converted as Audio Books, and NetLibrary operates an electronic library service for hosting and managing Audio Books and other materials over the Internet.

WHEREAS, Consortium desires to purchase licenses to certain Audio Books, as part of one or more Shared Collections; subject to the terms and conditions described in this Agreement.

WHEREAS, Consortium desires to market Audio Books and Audio Book Services to and for its Members.

IN CONSIDERATION OF THE MUTUAL COVENANTS AND OBLIGATIONS SET FORTH BELOW, the parties agree as follows.

## I. DEFINITIONS; AUDIO BOOK LICENSES

## A. Definitions

Terms defined within this Agreement have the respective meanings attributed to them throughout this Agreement or in this Section I.A. Any defined term may be used in the singular and in the plural, as appropriate in the context.

1. "Audio Books" mean NetLibrary's electronic versions of certain Audio Books and other works in which NetLibrary has acquired certain rights.

2. The "Audio Books License" means a license to use the relevant Audio Books(s).

3. The "Audio Books License Fee" means a one-time-only fee for Consortium's license to use the relevant Audio Books(s) and is determined by subtracting the applicable Discount from the Audio Books List Price.

4. The "Audio Books List Price" means the price established by NetLibrary for the license to use the relevant Audio Books(s).

5. "Consortium's NL Website" means the Website account operated by NetLibrary and open to Consortium, Members and Patrons in order to access and utilize the Shared Collection.

6. "Discount" means the percentage of the Audio Books List Price used in determining the Audio Books License Fee. Discounts do not apply to Platform Services.

7. The "Effective Date" of this Agreement means the latest execution date set forth on the signature block below or the date on which Consortium, any Member or any Patron may first access Audio Books, whichever date occurs first.

8. "Consortium's NL Website" means the Website operated by NetLibrary and open to Consortium, Members, and Patrons in order to access and use Audio Books licensed to Consortium.

9. A "MARC Record" means an electronic record containing metadata and other relevant information about the corresponding Audio Book.

10. The "Library Audio Book Agreement" refers to the "Audio Book Agreement for a Member of the Solinet Consortium" and means

an agreement by and between NetLibrary and a Member governing such Member's access to the Shared Collection(s), and the Member's purchase of Audio Book Licenses and related Audio Book Services for a Unique Collection. An example of the Member Audio Book Agreement is attached as Exhibit E. The Member Audio Book Agreement is subject to change from time to time by NetLibrary.

11. "Members" means the permitted member library organizations that Consortium has authorized to access the Shared Collection or Unique Collection by giving NetLibrary written notice and Consortium will provide for NetLibrary any individual information needed to identify said Member(s) and to provide them and their Patrons access. The Members of Consortium at the time this Agreement was executed are listed on Exhibit C.
12. "Member's NL Website" means the Website account operated by NetLibrary and open to the Member for which it is created and such Member's Patrons in order to access and utilize the Shared Collection(s).
13. "NL Website" means the Website operated by NetLibrary and open to the general public in order to provide information about NetLibrary's products and services.
14. "Patrons" mean Consortium's employees and other authorized users and Member's registered faculty, members, patrons, students, and other authorized users, including both onsite users and remote users. Patrons are individuals and may not be corporations or other entities, except with the prior written approval of NetLibrary. As used herein, Patrons may refer to Consortium's Patrons, Member's Patrons or all Patrons, as the case may be depending on the context.
15. The "Shared Collection(s)" means the collection(s) of Audio Books licensed to Consortium for access and use by Consortium, Members and Patrons pursuant to the terms and conditions of this Agreement.
16. The "SOLINET Subscriber Agreement" is an agreement by and between Consortium and a Member pursuant to which such Member is identified as a Member hereunder. An example of the SOLINET Subscriber Agreement is attached as Exhibit F hereto. The SOLINET Subscriber Agreement is subject to change from time to time by Consortium.
17. Subject to Section II.A below, the "Term" of this Agreement includes an "Initial Term," which commences on the Effective Date and continues in effect for one year, and any "Renewal Term(s)," which are automatic one year extensions of this Agreement that commence on each anniversary of the Effective Date unless this Agreement is terminated according to Section II.A.1 below.
18. A "Unique Collection" is a collection of Audio Books chosen by a Member and licensed to such Member pursuant to the terms and conditions of a separate "Library Audio Book Agreement" by and between NL and such Member. A Unique Collection remains separate from the Shared Collection(s). A Member may purchase Audio Book Licenses to a Unique Collection either directly from NL or through Consortium acting as such Member's agent pursuant to the Library Audio Book Agreement.

#### B. Audio Book Licenses.

##### 1. Purchase of Licenses.

- a. Audio Books. During the Term of the Agreement, Consortium may select and purchase Audio Book Licenses in accordance with NetLibrary's then current ordering practices. NetLibrary will make the Audio Books Licenses available to Consortium according to NetLibrary's agreements with its content providers, and partners. Such Audio Books will be a part of the Shared Collection. Consortium will be solely responsible for ensuring that it does not acquire or use Audio Books in violation of the laws of the Jurisdiction, and that all Consortium's activities hereunder comply in all respects with the applicable laws of the Jurisdiction. Each final order of Audio Book Licenses is incorporated in this Agreement by reference.

- b. MARC Records. As part of the relevant Platform Fee, NetLibrary will provide Consortium with one copy of the MARC Record that corresponds to each Audio Books License purchased by Consortium for the Shared Collection. NetLibrary and Consortium agree that all MARC Records are the property of OCLC; Consortium may use MARC Records only for its own internal purposes as further described in Exhibit B. NetLibrary will replace defective MARC Records if Consortium notifies NetLibrary of the defect within 90 days of NetLibrary's delivery of the MARC Record to Consortium and NetLibrary concurs that the MARC Record is defective.

2. Copyrighted Works. Consortium acknowledges and agrees that the copyright to each Audio Book is owned by or licensed to NetLibrary and the respective publisher thereof. All Rights Reserved. By purchasing a license to an Audio Book, Consortium obtains certain rights to access and use a copy of the Audio Book under this Agreement, but neither Consortium, Member, nor Patrons obtain or own any rights in the copyrights or any other intellectual property rights that may be associated with the Audio Book. Consortium agrees that any use of Audio Books by Consortium, its Members, and its Patrons is governed by and will comply with applicable laws, including without limit U.S. copyright laws. Consortium acknowledges that it and its Patrons have no right to make copies of any Audio Book, or any portions thereof, except to the extent permitted by applicable copyright laws and neither it, Members, nor Patrons have any right to grant any third parties the right to use any Audio Book (for purposes of this sentence, third parties does not include Patrons).

#### C. Consortium Services.

Consortium will assist NetLibrary in the marketing of Audio Books and Platform Services to Members. During the term of this Agreement, Consortium may act as an agent for a Member listed on Exhibit C. Consortium may aggregate sales and accept invoices from NetLibrary for Audio Book Licenses for a Shared Collection and related Audio Book Services only if such are purchased by a Member listed on Exhibit C, and in such event, Consortium will pay such invoices pursuant to the terms and conditions set forth in this Agreement.

### II. GENERAL PROVISIONS

#### A. Termination.

1. Termination Without Cause. Either party may terminate this Agreement without cause effective upon the conclusion of the then current Initial Term or Renewal Term, as applicable, by providing the other party with at least 90 days prior written notice of its intent to do so.
2. Termination for Cause. Either party may terminate this Agreement for cause at any time by providing the other party with prior written notice of the occurrence of any of the following events:
  - a. a party fails to timely pay any amounts due and payable, provided that the nonpayment is not cured within 10 business days of the notice; or
  - b. a party violates any material provision of this Agreement, including without limit a material failure to provide required services, a breach by Consortium, a Member, or Patrons of copyright laws, failure to comply with any security documents or a breach of the confidentiality provisions of this Agreement, or otherwise has committed breaches of this Agreement that, in the aggregate, are material, provided that the breach(es) cannot be, or is(are) not, cured within 90 days of the notice.
3. Survival. All terms of this Agreement that are intended to survive termination for any reason of this Agreement will so survive, including without limit Section I.B.2; Section(s) II.B, C, D, E, F, G, H.5 and H.13; and Section D of Exhibit A.

#### B. Limited Warranty.

NetLibrary warrants that, as to any Audio Books licensed to Consortium under this Agreement, NetLibrary has the necessary authority to license the Audio Books to Consortium and to provide Platform Services to Consortium. NetLibrary warrants that it will



use its commercially reasonable efforts to provide Platform Services as described in this Agreement.

**C. Warranty Disclaimer.**

EXCEPT AS EXPRESSLY PROVIDED IN SECTION II.B ABOVE, CONSORTIUM'S NL WEBSITE, MEMBER'S NL WEBSITE(S), PLATFORM SERVICES, AND ALL AUDIO BOOKS LICENSED UNDER THIS AGREEMENT ARE PROVIDED "AS IS" WITHOUT ANY WARRANTY OF ANY KIND AND NETLIBRARY ITS CONTENT PROVIDERS, AND CONSORTIUM EXPRESSLY DISCLAIM ALL IMPLIED WARRANTIES, INCLUDING WITHOUT LIMIT THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE. NEITHER NETLIBRARY, ITS CONTENT PROVIDERS, NOR CONSORTIUM WARRANTS, GUARANTEES OR MAKES ANY REPRESENTATIONS REGARDING THE USE, OR THE RESULTS OF THE USE, OF CONSORTIUM'S NL WEBSITE, MEMBER'S NL WEBSITE(S), OR AUDIO BOOKS. NO ORAL OR WRITTEN INFORMATION OR ADVICE GIVEN BY NETLIBRARY OR CONSORTIUM OR EMPLOYEES OF EITHER PARTY WILL CREATE A REPRESENTATION OR WARRANTY OR IN ANY WAY INCREASE THE SCOPE OF NETLIBRARY'S OBLIGATIONS, AND CONSORTIUM MAY NOT RELY ON ANY SUCH INFORMATION OR ADVICE.

**D. Indemnity.**

NetLibrary will defend, indemnify, and hold Consortium harmless from any action based solely on a claim that Audio Books furnished and used within the scope of this Agreement infringe any copyright of any third party, except that this indemnity will not apply to copyright claims arising from content that has been provided to NetLibrary by publishers and is provided by NetLibrary without substantive modification (except for conversion to digital format). Consortium will defend, indemnify, and hold NetLibrary harmless from any action based on a claim that Consortium has failed to comply with the laws of the Jurisdiction or that the use by Consortium, Members, or Patrons of Consortium's NL Website, Member's NL Website, if applicable, or Audio Books in violation of the terms of this Agreement infringes any copyrights or trade secrets of any third party.

**E. Limitation on Liability.**

Neither party will claim special, incidental, indirect, or consequential damages, including without limit lost profits, for breach of this Agreement. This limitation will also apply to any claims brought against NetLibrary's content providers. Remedies are limited to claims for amounts due, for injunctive relief only as provided, or for direct damages. Except as provided in Section III.D. above, a party's aggregate liability for any and all claims, losses, liabilities, and demands arising, whether for breach of contract, in tort or otherwise, are limited to the total amount of Audio Book License Fees, and Platform Fees (collectively, "Fees") paid by Consortium to NetLibrary, during the 12 month period immediately preceding the date on which the claim first arose. Notwithstanding any other provision of this Agreement, the nonbreaching party may seek injunctive relief in any court of competent jurisdiction to enjoin or restrain the breaching party from continuing to do any act or commit any violation or threatened violation of this Agreement, and the prevailing party, if any, on a claim for injunctive relief is entitled to recover its reasonable attorney fees incurred in connection with that proceeding. Injunctive relief will be without prejudice to the nonbreaching party's right to also seek money damages for breach of this Agreement.

**F. Confidential Information.**

To the extent allowed by applicable law, Consortium agrees that it will not use or disclose information relating to (i) the terms of this Agreement, (ii) the content of reports delivered under this Agreement, (iii) pricing terms and other business arrangements governed by this Agreement and (iv) any other documents provided by NetLibrary that have a confidential, proprietary or other similar designation or should reasonably be believed to be the confidential or proprietary information of NetLibrary or its content providers. Notwithstanding the foregoing, Consortium may disclose such

information to Members, provided that Members are required to hold such information in confidence and Consortium remains responsible for the disclosure of such information.

**G. Payment Terms.**

All fees and charges are due and payable 60 days from the date of the related invoice. NetLibrary or Consortium has the right to charge 1% interest per month on any invoice that remains unpaid longer than 60 days from the date of the applicable invoice; in addition, NetLibrary may deny Consortium, Members, and Patrons access to Consortium's NL Website and Member's NL Website, if applicable, until the unpaid invoice is paid in full. Consortium will be solely responsible for remitting to NetLibrary all sums due pursuant to this Agreement. In the event Consortium disputes a line item on an invoice due to an error occurring in the ordering process or due to an error occurring in the calculation of the invoice, Consortium will so notify NetLibrary and the parties will work together to resolve the dispute. All undisputed amounts will remain due and payable according to the terms of this Agreement. Consortium may determine the amounts that Members will pay Consortium for the Audio Book Licenses and Platform Services provided hereunder, and Consortium may collect such amounts from Members.

**H. Other Provisions.**

1. **Entire Agreement.** All exhibits referred to in this Agreement are incorporated in this Agreement by reference. Any modification or amendment to Section(s) B. and C of Exhibit A under Section II.H.2 below will also be incorporated in this Agreement by reference. This Agreement sets forth the entire agreement between the parties with respect to the subject matter of the Agreement, merges all discussions between them and supersedes and replaces any and every other prior or contemporaneous agreement, understanding or negotiation that may have existed between NetLibrary and Consortium to the extent that any such agreement relates to the subject matter of the Agreement. This Agreement governs all orders for Audio Books and Platform Services placed by Consortium for the Shared Collection during the Term.
2. **Modification or Amendment.** Notwithstanding any other provision in this Agreement, NetLibrary will have the right to modify and amend Section(s) B. and C of Exhibit A to this Agreement provided that NetLibrary provides Consortium with at least 30 days prior written notice; and, in this event, the modified or amended Exhibit(s) will not be effective before the end of the 30 day notice period. Any other modification or amendment of this Agreement must be in writing and signed by a duly authorized representative of each party. For clarification, no term contained in a purchase order or other similar document submitted to NetLibrary by Consortium or any Member will become binding on the parties unless and until the term is mutually agreed upon in a written modification or amendment to this Agreement as described above.
3. **Assignment.** Neither party may sell, assign, transfer or convey this Agreement or any rights and obligations without the prior written consent of the other party, which will not be unreasonably withheld. Notwithstanding the foregoing, NetLibrary reserves the right to assign or transfer this Agreement to an affiliated company or to a third party that acquires substantially all of its assets upon written notice to the Consortium.
4. **Successors and Assigns.** This Agreement will be binding upon and inure to the benefit of the parties and their respective permitted successors and assigns.
5. **Governing Law, Jurisdiction and Venue.** This Agreement will be governed by the laws of the State of Colorado, U.S.A., without regard to any conflict of laws provisions contained in this Agreement. NetLibrary and Consortium agree that any action arising from or out of the negotiations, execution, interpretation or enforcement of this Agreement may be brought in the state or federal courts located in the State of Colorado, U.S.A. Consortium hereby consents to jurisdiction and venue in the state and federal courts in Colorado, U.S.A.



6. **Interpretation.** The use of headings in this Agreement is solely for the mutual convenience of the parties and will not affect the construction.
7. **Severability.** If any provision of this Agreement proves to be illegal, invalid or unenforceable, the remainder of this Agreement will not be affected thereby, and in lieu of any provision of this Agreement that is illegal, invalid or unenforceable, there will be added as a part of this Agreement a provision as similar in terms to the illegal, invalid or unenforceable provision as may be possible to be legal, valid and enforceable, provided that such provision is mutually agreed upon by the parties. If a replacement provision is not mutually agreed upon by the parties, then the illegal, invalid or unenforceable provision will be severed from this Agreement and the remaining provisions of this Agreement will remain in full force and effect.
8. **Further Assurances.** Consortium and NetLibrary agree to take the further actions and to execute the further documents as may be necessary or appropriate to effectuate this Agreement and the transactions contemplated in this Agreement.
9. **Force Majeure.** Consortium acknowledges that the Internet is an unsecure, unstable, unregulated, unorganized and unreliable environment, and that the ability of NetLibrary to deliver Platform Services may depend upon the Internet and equipment, software, systems, data and services provided by various telecommunications carriers, equipment manufacturers, firewall providers, encryption system developers and other vendors and third parties. Neither party will be liable for, or have the right to terminate this Agreement as a result of, any delays or failures to perform any of its obligations under the Agreement to the extent that the delays or failures are due to circumstances beyond its reasonable control, including without limit acts of God; strikes; riots; acts of war; power failures; and functions or malfunctions of the Internet, telecommunications services, firewalls, encryption systems, and security devices; or governmental regulations imposed after the Effective Date.
10. **Waiver.** The waiver by either party of any right granted under this Agreement will not be deemed a waiver of any other right granted under this Agreement, or a precedent for any subsequent waiver.
11. **No Partnership.** As to one another the parties are considered independent contractors. It is not the intention of the parties to create, nor will this Agreement be construed as creating, a partnership, joint venture, agency relationship, or other association; or render the parties liable as partners, co-venturers, agents, or principals.
12. **No Third Party Beneficiaries.** This Agreement is not intended to confer any benefit on any person or entity not a party to this Agreement.
13. **Notices.** Any notice, demand, request, consent, approval or other communication (collectively, "Notices") required or permitted to be given under this Agreement will be in writing and sent by hand delivery, special courier capable of confirming receipt, United States Mail (certified mail, return receipt requested), or facsimile or e-mail to a non-individual-specific e-mail address if

receipt is confirmed. The parties acknowledge and agree that a Notice might not be deemed effective if receipt is not confirmed. Notices will be deemed given under the following rules: if hand delivered, at the time of delivery; if sent by special courier, on the third day after delivery to the courier; if mailed, on the seventh day after deposit in the United States Mail; and if sent by facsimile or e-mail to a non-individual-specific e-mail address, on the date transmitted if the sender receives confirmation that the transmission was received during the notified party's normal business hours, otherwise on the notified party's next normal business day. Notices will be sent to the following addresses:

	If to NL:	If to Consortium:
	NetLibrary, a division of OCLC Online Computer Library Center, Inc.	SOLINET
Address:	4888 Pearl East Circle, Suite 103	1438 West Peachtree Street NW, Suite 200
Address:	Boulder, Colorado 80301	Atlanta, GA 30309-2955
Attention:	Sales Management	Manager, Program Management and Development
Telephone:	(303) 415-2548	404 892 0943
Facsimile:	(303) 381-8600	404 892 7879
e-mail address:	sales@netlibrary.com	pmde@solinet.net

14. **Facsimile Copies.** A copy of the signed original of this Agreement transmitted by facsimile machine will be binding on both parties and have the same force and effect as the signed original.
15. **Conflict Among Agreements.** In the event of conflict between the Library Audio Book Agreement: SOLINET Member Terms and Conditions and the SOLINET Subscriber Agreement, the Library Audio Book Agreement: SOLINET Member Terms and Conditions will control matters arising between NetLibrary and Member and the SOLINET Subscriber Agreement will control matters arising between Consortium and Member. Nothing in the Library Audio Book Agreement: SOLINET Member Terms and Conditions will be interpreted to increase Consortium's obligations or decrease Consortium's rights under this Agreement or the SOLINET Subscriber Agreement; nothing in the SOLINET Subscriber Agreement will be interpreted to increase NetLibrary's obligations or decrease NetLibrary's rights under this Agreement or the Library Audio Book Agreement: SOLINET Member Terms and Conditions.

#### EXHIBIT A TO CONSORTIUM AGREEMENT FOR AUDIO BOOK PURCHASES – PLATFORM FEE

##### A. Definitions.

1. "Limiting Access Measures" mean appropriate measures to limit the use of Audio Books through access by Patrons. Limiting Access Measures are to comply with NetLibrary's reasonable application requirements which may change from time to time and may include, but are not limited to, remote patron authentication applications, authentication through protected IP addresses, a patterned identification check and privileged user accounts. NetLibrary will consider other Limiting Access Measures on a case-by-case basis, but may reject the proposed methods if, in NetLibrary's opinion, access will not be sufficiently controlled.
2. "Platform Fee" means the fee Consortium pays to maintain Consortium's NL Website and Member's NL Website, if applicable, and to maintain and upgrade the Existing Platform and bandwidth. Platform Fees include Platform Services. Consortium may pay the

Platform Fee on the basis described in this Exhibit A.

3. "Platform Services" mean NetLibrary's services related to Consortium's ongoing access to and use of Audio Books or Subscription(s) to Audio Books via the Internet and Consortium's NL Website and Member's NL Website, if applicable, as further described in this Exhibit A.
3. The "Reinstatement Fee" means the fee associated with reinstating Platform Services for an Audio Book for which Platform Services were previously terminated, as further described in this Exhibit A.

##### B. Annual Platform Fee.

1. The Annual Platform Fee for an order will equal 10% of the Audio Book List Price(s) for all the Audio Book(s) in the order at the time of initial licensing.



2. Upon payment of an Annual Platform Fee, NetLibrary will host and provide Platform Services for the effected Audio Books for 1 year from the purchase date.
3. The first payment of the Annual Platform Fee for an order will be due and payable at the time the Consortium purchases the Audio Book Licenses, and will be included on the invoice for the corresponding Audio Book License Fees.
4. NetLibrary may calculate and invoice Annual Platform Fees for the first year on an annualized basis. NetLibrary will calculate and invoice Annual Platform Fees for the second and subsequent years on an annualized basis on a single date each year.
5. The Reinstatement Fee for an Audio Book will equal 10% of the Audio Book List Price.
6. The Annual Platform Fee in the second and subsequent years will be reduced by the portion of the first year Annual Platform Fee attributable to any Audio Book removed from, and not reinstated to, Consortium's Audio Book collection as further described in this Exhibit.
7. If NetLibrary elects not to continue to support the Existing Platform at any time due to technological obsolescence or cessation of third party vendor support, NetLibrary may charge Consortium additional fees for migrating the Audio Books for which Consortium is paying the Annual Platform Fee to a replacement platform, subject to any applicable limitations as set out on Exhibit A.

#### C. Platform Services

##### 1. Provision and Delivery of Platform Services.

- a. If Consortium has paid the Platform Fee; then, subject to the terms of this Agreement, Consortium will receive Platform Services.
- b. Platform Services include:
  - i. establishing and administering Consortium's NL Website and Member's NL Websites, if appropriate,
  - ii. hosting the Audio Books or Audio Books Collection, as applicable, on Consortium's NL Website,
  - iii. providing management services for the Shared Collection(s), and
  - iv. providing access - to Consortium, Members, and Patrons - to Consortium's Audio Books or Audio Books Collection, as applicable, through Consortium's NL Website.
- c. Consortium, Members, and Patrons will access Platform Services via Consortium's Internet connection or Member's Internet connection, as applicable, which will be Consortium's expense and responsibility or Member's expense and responsibility, as applicable.
- d. NetLibrary will provide Platform Services for as long as Consortium continues to pay the Platform Fee, NetLibrary continues to support the Existing Platform, and Consortium has not notified NetLibrary to remove the Audio Books from Consortium's NL Website.

##### e. Removing and Reinstating Audio Books.

- i. Consortium may elect to have any Audio Books removed from Consortium's NL Website, by providing NetLibrary with written notice of the election within 60 days of the annualized date on which Platform Fees are calculated and invoiced.
- ii. Consortium may elect to have any Audio Books reinstated to Consortium's NL Website, by providing NetLibrary with written notice of the election within 60 days of the annualized date on which Platform Fees are calculated and invoiced and by paying the applicable Reinstatement Fee as further described in Exhibit A. Platform Fees for reinstated Audio Books are due and payable on the reinstatement date.
- f. Notwithstanding any other provision of this Agreement, if NetLibrary terminates this Agreement for cause under Section II.A.2. of the Agreement, then NetLibrary's obligation to provide Audio Books and Platform Services will expire.

##### 2. Support for NL Website and Consortium's NL Website.

- a. Existing Platform. At the time this Agreement is executed, the

NL Website, the Consortium's NL Website, and the Member's NL Website are supported by NetLibrary's existing electronic bookshelf technology, which includes a third party operating system, third party database management software, and proprietary NetLibrary software (collectively, the "Existing Platform"). NetLibrary will not charge any fees to continue to support the operation of the Existing Platform, except as may be provided in this Agreement.

- b. Platform Commitment Date. Initially, the "Platform Commitment" Date will be July 1, 2012. However, NetLibrary may publish or announce a specific date as the Platform Commitment Date or a change in the practice of determining the Platform Commitment Date, provided that the publication or announcement will only be applicable to purchases of Audio Books licenses made after the date of the publication or announcement.

- c. Migration. If the Existing Platform becomes technologically obsolete and/or third party vendors cease to support third party components of the Existing Platform before the Platform Commitment Date; then, except as may be provided in this Agreement, NetLibrary will not charge Consortium any additional fees to support the Existing Platform until the Platform Commitment Date or to migrate Consortium's Audio Books to a replacement platform before the Platform Commitment Date. If the Existing Platform becomes technologically obsolete and/or third party vendors cease to support third party components of the Existing Platform after the Platform Commitment Date, then NetLibrary may charge fees to support a replacement platform or to migrate Consortium's Audio Books to a replacement platform.

##### 3. Patron Access.

Consortium will implement and maintain Limiting Access Measures, based on NetLibrary's standard systems, which will control Consortium's, Members' and Patrons' access to Consortium's NL Website, and Members NL Website, if applicable.

##### 4. Reports.

Payment of the Platform Fees entitles Consortium to the standard reports offered by NetLibrary. These reports may be modified by NetLibrary from time to time and may include without limit: current discount schedule, transaction history, owned Audio Books, popular Audio Books, Audio Books not owned, all Audio Books, new Audio Books, activity by subject area and activity by title. Nonstandard reports may be developed for a fee on a case-by-case basis.

#### D. Consortium and Patron Usage.

1. Limiting Access Measures. Consortium will be solely responsible for determining which Members will have access to Consortium's NL Website and Member's NL Website, as applicable, under this Agreement. Consortium and Members will be jointly responsible for determining which Patrons will have access to Consortium's NL Website and Member's NL Website, as applicable, under this Agreement. Consortium agrees to: (a) implement Limiting Access Measures within a reasonable time frame, (b) communicate to Members the requirement to implement Limiting Access Measures, and (c) reasonably assist NetLibrary in bringing a Member into compliance with Limiting Access Measures if the Member is discovered to be out of compliance. NetLibrary, in its sole discretion, may discontinue Consortium's or a Member's access to Consortium's NL Website and Member's NL Website, as applicable, if Consortium or the Member fails to implement Limiting Access Measures within a reasonable timeframe. Except for standard fees charged by Consortium to Members and/or Patrons, neither Consortium nor Members will charge any Patron for use of Consortium's NL Website or Member's NL Website, if applicable.

2. Terms of Use. The use of Member's NL Website and Consortium's NL Website, as applicable, by Consortium, Members, and Patrons will be governed by the "Terms of Use" currently available at <http://www.netlibrary.com/TermsOfUse.aspx>, as they may be amended from time to time, which are incorporated in this

Agreement by reference. If a Consortium, a Member, or a Patron violates the Terms of Use, NetLibrary reserves the right, in its sole discretion, to suspend or terminate Consortium's, the Member's, or the Patron's access to and use of Consortium's NL Website and Member's NL Website, as applicable. At its sole option, NetLibrary may notify Consortium of any violation by a Member or a Patron of the Terms of Use, and in the event, also at its sole option, NetLibrary may grant Consortium three days to attempt to correct the violation by a Member or a Patron and NetLibrary will not terminate the Member's or Patron's access to and use of Consortium's NL Website and Member's NL Website if the violation is corrected within the three day period. Consortium acknowledges and agrees that, in the case of repeated or persistent violations, NetLibrary may not provide the aforementioned notice and correction period to Consortium. Repeated or persistent violations of the Terms of Use by Consortium, Members, or Patrons may be cause for termination of this Agreement by NetLibrary. Notwithstanding the foregoing, NetLibrary agrees that it will not terminate this Agreement or deny Consortium, Members or Patrons access to Consortium's NL Website, or Member's NL Website, if applicable, if Consortium did not willfully or recklessly assist in or encourage the violation of the Terms of Use or permit such violation to continue after receiving notice thereof, provided that Consortium: (a) notifies NetLibrary immediately of any known violations, (b) terminates the violating Member's or Patron's access to Consortium's NL Website, or Member's NL Website, if applicable, and (c) assists NetLibrary in preventing further violations. However, if repeated or persistent violations of the Terms of Use by Consortium, Members or Patrons continue, NetLibrary reserves the right to terminate this Agreement for cause pursuant to Section III.A.2. of the Agreement.

3. Tools. Neither Consortium nor Members, if applicable, will use, implement or authorize use of any computerized or automated tool or application to search, index, test or otherwise obtain information from Consortium's NL Website and Member's NL Website, as applicable, including without limit any "spidering" or web crawler application (collectively, "Tools"), without obtaining the prior written approval of NetLibrary. NetLibrary will not unreasonably withhold this approval, provided that the proposed use of Tools does not (i) present a risk of interfering with use of NL Website by Members, Patrons or other NetLibrary end-users; (ii) degrade or impair the performance of NL Website; (iii) cause NetLibrary to violate its agreements with its other end-users, its

publishers or other third parties; or (iv) constitute a violation of applicable law, including without limit U.S. copyright law. Consortium acknowledges and agrees that NetLibrary may from time to time implement controls on Consortium's NL Website and Member's NL Website, if applicable, to regulate or restrict the use of Tools.

E. Member Access.

1. Shared Collection(s) Access. NetLibrary will only permit access to and use of a Shared Collection(s) by a Member of Consortium and the Member's Patrons if:

- Consortium has executed a Consortium Agreement with NetLibrary,
- Consortium has given NetLibrary written notice that Consortium is willing to allow the Member to access a particular Shared Collection, and
- the Member has executed a Member Audio Book Agreement with NetLibrary.

Until all of these conditions have been satisfied, NetLibrary will have no obligation to permit any Member of Consortium to access any Shared Collection of Consortium.

2. Shared Collection(s) Parameters. At the time of purchase the Shared Collection closes. NetLibrary will provide access to this Shared Collection to the Members that Consortium has authorized to access the Shared Collection by giving NetLibrary written notice within 30 days after the Shared Collection closes. NetLibrary will not provide access to this Shared Collection to any Members that Consortium has not authorized to access the Shared Collection by giving NetLibrary written notice within 30 days after the Shared Collection closes.

3. Unique Collection. Though Consortium Members for whom Consortium has not given NetLibrary written notice are not permitted to access the Shared Collection(s), Consortium and some number of its Members can purchase additional Audio Books on a shared basis by purchasing another Shared Collection. Members can also purchase a Unique Collection.

4. Notice Requirements. In addition to giving NetLibrary written notice that Consortium is willing to allow a Member to access a particular Shared Collection, Consortium will provide for NetLibrary any individual information needed to identify the Member(s) and to provide them and their Patrons access to the Shared Collection.



## EXHIBIT B TO CONSORTIUM AGREEMENT FOR AUDIO BOOK PURCHASES-- GUIDELINES FOR THE USE AND TRANSFER OF OCLC-DERIVED RECORDS

REVISION OF NOVEMBER 16, 1987

## I. GUIDELINES

(See Definitions in Part II below)

1. Each member and nonmember library may use records without restriction, and may transfer records of its own holdings without restriction to other libraries.
2. In addition to transfers to libraries, each member and nonmember library may transfer records of its own holdings without restriction, to
  - (a) member networks, (b) state and multi-state library agencies and (c) all other noncommercial firms.
    - a. Member networks may produce and transfer to any member library, copies on magnetic tape of records used or inserted into the OCLC database by the library. Each member network also may process records of the holdings of any member or nonmember library which has employed and agreed to pay it for that service, provided the member network has first signed either an individual agreement with the library, or a general agreement with OCLC, containing measures agreed upon by OCLC and the member network for protection of the records it has been employed to process. Any other use and transfer of records by member networks will be as provided in separate understandings with OCLC.
    - b. The use and transfer of records by library systems or projects operated by or under the aegis of one or more state or national library agencies will be as provided in separate understandings with OCLC. Such understandings may include (i) arrangements to incorporate state or national bibliographic databases into the OCLC system, (ii) paid-up licenses to use records in state or national programs (e.g., by means of payments for OCLC multi-institution tapes) and/or (iii) any other understandings that will facilitate state or national programs as well as the maintenance and enhancement of the OCLC database.
    - c. The use and transfer of records by any other organizations to which transfers are made under this Guideline 2 will be as provided in separate understandings with OCLC.
3. In addition, each member and nonmember library may transfer records of its own holdings to commercial firms which the library has employed and agreed to pay to process such records, provided that each commercial firm has first signed an individual agreement with the library, or OCLC has advised the library that the commercial firm has signed a general agreement with OCLC, in either case containing measures agreed upon by OCLC and the commercial firm for protection of the records it has been employed to process. In addition, each member and nonmember library may make any other transfers of records to commercial firms, subject to prior written agreements with OCLC. However, there is no requirement for prior written agreements (a) for transfers made under Guideline 1 above to libraries operated by commercial firms or (b) for transfers to commercial firms by former OCLC member libraries of records of their holdings, so long as the libraries maintain no continuing user status with OCLC.
4. When a nonmember organization makes bibliographic information available to OCLC which is subject to usage or transfer restrictions imposed by such nonmember organization, and OCLC nevertheless elects to accept the information for addition to the OCLC database, OCLC will notify libraries to which it makes the information available, and rights to use and transfer records based on such information will be subject to the same restrictions.
5. When transfers under Guideline 1 above are made to machine-readable union catalogs accessible by nonmember libraries, it is requested that machine-readable copies of the records of such union catalogs be submitted to OCLC. OCLC, at its own expense, will have the right to add such records to its database for all uses consistent with its chartered purposes.
6. The Guidelines above apply to all uses and transfers of records except where a mutually acceptable agreement establishing broader or narrower rights is made with OCLC relating to a specific product or service.

## II. DEFINITIONS

1. The term "member library" means a general member of OCLC as defined in its Code of Regulations.
2. The term "nonmember library" means any library other than a member library.
3. A "member network" is an OCLC-affiliated regional, state or multi-state library network organization which is in contract with OCLC to provide OCLC services and products, or to assist OCLC to provide such services and products, to general members of OCLC.
4. A "commercial firm" is any organization permitted, under applicable law, to operate on a for-profit basis.
5. The term "records" means bibliographic records and holdings data (including copies thereof) derived from the OCLC database, including derivative works made from such records, and either received in machine-readable form or converted by the transferee into machine-readable form. The term also includes such records when held only in eye-readable form, in the case of proposed transfers to commercial firms. However, records do not include, as to any member or nonmember library (a) bibliographic records designated in the OCLC database as original cataloging by such member or nonmember library and (b) bibliographic records derived by such member or nonmember library from sources other than the OCLC database and to copies of which in the OCLC database its holdings symbol has been attached by tape-loading. Such excluded records are freely transferable and are not dealt with in these Guidelines. OCLC-derived records held only in eye-readable form are freely transferable except to commercial firms.
6. The terms "transfer" and "transfer of records" refer to all sales, exchanges, gifts, sharing and other transfers, and all online access except online access provided to end-user patrons of a library in authorized possession of the records.

EXHIBIT C TO CONSORTIUM AGREEMENT FOR AUDIO BOOK PURCHASES – CONSORTIUM'S MEMBERS

As of \_\_/\_\_/07



EXHIBIT D TO CONSORTIUM AGREEMENT FOR AUDIO BOOK PURCHASES -- COMMERCIAL TERMS FOR SOLINET SHARED COLLECTION #1

A. Discount.

1. The Discount applicable to Consortium's order of Audio Book License Fees for Solinet Shared Collection #1 will be four percent (4%).
2. The Discount specified in this Section will apply to orders for Audio Books that Consortium places for Solinet Shared Collection #1 between now and June 26, 2007.

B. Member Cancellation.

1. If a Consortium Member Library should cancel its commitment to participate in the SOLINET Shared Collection #1 after Consortium has made the final purchase based on all committed funds, Consortium will use commercially reasonable efforts to find a Library to assume the commitment.
2. If Consortium can not find a Library to assume the commitment within thirty (30) days after the close of the collection, NetLibrary will refund the cancelled amount to Consortium.

## EXHIBIT E TO CONSORTIUM AGREEMENT FOR AUDIO BOOK PURCHASES - LIBRARY AUDIO BOOK AGREEMENT

## SOLINET MEMBER TERMS AND CONDITIONS

Library Agreement for Audio Book Purchases.....	10
I. DEFINITIONS; AUDIO BOOK LICENSES.....	10
A. Definitions.....	10
B. Audio Book Licenses.....	11
II. GENERAL PROVISIONS.....	11
A. Termination.....	11
B. Limited Warranty.....	11
C. Warranty Disclaimer.....	11
D. Indemnity.....	11
E. Limitation on Liability.....	12
F. Confidential Information.....	12
G. Payment Terms.....	12
H. Other Provisions.....	12
Exhibit A to Library Agreement for Audio Book Purchases - Platform Fee.....	13
A. Definitions.....	13
B. Annual Platform Fee.....	13
C. Platform Services.....	13
D. Member and Patron Usage.....	13
Exhibit B to Library Agreement for Audio Book Purchases - Guidelines for the Use and Transfer of OCLC-Derived Records.....	15

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed by their duly authorized representatives, to be effective as of the Effective Date, as set forth below.

Member: \_\_\_\_\_  
 By: \_\_\_\_\_  
 Name: \_\_\_\_\_  
 Title: \_\_\_\_\_  
 Date: \_\_\_\_\_

NetLibrary: NetLibrary, a division of OCLC Online  
 Computer Library Center, Inc.  
 By: \_\_\_\_\_  
 Name: Rick Schwieterman  
 Title: Vice President and Chief Financial  
 Officer  
 Date: \_\_\_\_\_

THIS LIBRARY AGREEMENT FOR AUDIO BOOK PURCHASES (this "Agreement") is by and between \_\_\_\_\_ ("Member") and NetLibrary, a division of OCLC Online Computer Library Center, Inc., an Ohio nonprofit corporation ("NetLibrary").

WHEREAS, NetLibrary has acquired certain rights to convert various books and other works to electronic format and to market and distribute the works as converted as Audio Books, and NetLibrary operates an electronic library service for hosting and managing Audio Books and other materials over the Internet.

WHEREAS, NetLibrary and Solinet ("Consortium") have entered into a consortium Audio Book agreement (the "Consortium Audio Book Agreement").

WHEREAS, Consortium has given NetLibrary written notice that Consortium is willing to allow Member to access a particular Shared Collection and Member has been designated a "Member" of Consortium as defined in the Consortium Audio Book Agreement (for clarification, capitalized terms used herein and not defined herein will have the meanings assigned to them in the applicable Consortium Audio Book Agreement).

WHEREAS, Member desires to purchase licenses to certain Audio Books, as part of the discrete Shared or Unique Collection; subject to the terms and conditions described in this Agreement.

IN CONSIDERATION OF THE MUTUAL COVENANTS AND OBLIGATIONS SET FORTH BELOW, the parties agree as follows.

## I. DEFINITIONS; AUDIO BOOK LICENSES

## A. Definitions.

Terms defined within this Agreement have the respective meanings attributed to them throughout this Agreement or in this Section I.A. Any defined term may be used in the singular and in the plural, as appropriate in the context.

1. "Audio Books" mean NetLibrary's electronic versions of certain Audio Books and other works in which NetLibrary has acquired certain rights.
2. The "Audio Books License" means a license to use the relevant Audio Books(s).
3. The "Audio Books License Fee" means a one-time-only fee for Member's license to use the relevant Audio Books(s) and is determined by subtracting the applicable Discount from the Audio Books List Price.
4. The "Audio Books List Price" means the price established by NetLibrary for the license to use the relevant Audio Books(s).
5. "Discount" means the percentage of the Audio Books List Price used in determining the Audio Books License Fee. Discounts do not apply to Platform Services.
6. The "Effective Date" of this Agreement means the latest execution date set forth on the signature block below or the date on which Member or any Patron may first access Audio Books, whichever date occurs first.
7. "Member's NL Website" means the Website operated by NetLibrary and open to Member and Patrons in order to access and use Audio Books licensed to Member.



8. A "MARC Record" means an electronic record containing metadata and other relevant information about the corresponding Audio Book.

9. "NL Website" means the Website operated by NetLibrary and open to the general public in order to provide information about NetLibrary's products and services.

10. "Patrons" mean Member's registered faculty, members, patrons, students, and other authorized users, including both onsite users and remote users. Patrons are individuals and may not be corporations or other entities.

11. The "Shared Collection(s)" means a collection(s) of Audio Books licensed to Consortium for access and use by Consortium and its participating Members and Patrons (as such terms are defined in the applicable Consortium Audio Book Agreement) under the terms and conditions of the Consortium Audio Book Agreement with respect to Shared Collection(s) and this Agreement; nothing in this Agreement is intended to grant Member any rights in the Shared Collection(s) without completion of appropriate paperwork and payment of related fees.

12. Subject to Section II.A below, the "Term" of this Agreement includes an "Initial Term," which commences on the Effective Date and continues in effect for one year, and any "Renewal Term(s)," which are automatic one year extensions of this Agreement that commence on each anniversary of the Effective Date unless this Agreement is terminated according to Section II.A.1 below.

13. A "Unique Collection" means a collection of Audio Books chosen by a Member and licensed to the Member under the terms and conditions of this Agreement. The Unique Collection remains separate from the Shared Collection(s). The Unique Collection is only accessible by Member and its Patrons; the Unique Collection is not accessible by Consortium or by nonpurchasing Members and Patrons (as such terms are defined in the applicable Consortium Audio Book Agreement).

#### B. Audio Book Licenses.

##### 1. Purchase of Licenses.

###### a. Audio Books.

i. During the Term of the Agreement, Member may select and purchase Audio Book Licenses in accordance with NetLibrary's then current ordering practices. NetLibrary will make the Audio Books Licenses available to Member according to NetLibrary's agreements with its content providers, and partners. Each final order of Audio Book Licenses is incorporated in this Agreement by reference.

ii. Member designates Consortium as its agent for acquiring rights to Audio Books on behalf of Member under the Consortium Audio Book Agreement and with the authority to act, including without limit ordering Audio Books, on behalf of Member under this Agreement and the Consortium Audio Book Agreement. NetLibrary is authorized to rely on this designation and to recognize Consortium as an agent of Member. Member agrees to comply with and be bound by all the provisions of the Consortium Audio Book Agreement applicable to "Members" as defined in the Consortium Audio Book Agreement.

b. **MARC Records.** As part of the relevant Platform Fee; NetLibrary will provide Member with one copy of the MARC Record that corresponds to each Audio Books License purchased by Member for the Unique Collection. NetLibrary and Member agree that all MARC Records are the property of OCLC; Member may use MARC Records only for its own internal purposes as further described in Exhibit B. NetLibrary will replace defective MARC Records if Member notifies NetLibrary of the defect within 90 days of NetLibrary's delivery of the MARC Record to Member and NetLibrary concurs that the MARC Record is defective.

2. **Copyrighted Works.** Member acknowledges and agrees that the copyright to each Audio Book is owned by or licensed to NetLibrary and the respective publisher thereof. All Rights Reserved. By purchasing a license to an Audio Book, Member

obtains certain rights to access and use a copy of the Audio Book under this Agreement, but Member does not obtain or own any rights in the copyrights or any other intellectual property rights that may be associated with the Audio Book. Member agrees that it is responsible for all use of Audio Books by Member and its Patrons, and that any use of Audio Books by Member and its Patrons is governed by and will comply with applicable laws, including without limit U.S. copyright laws. Member acknowledges that it and its Patrons have no right to make copies of any Audio Book, or any portions thereof, except to the extent permitted by applicable copyright laws and neither it nor Patrons have any right to grant any third parties the right to use any Audio Book (for purposes of this sentence, third parties does not include Patrons).

#### II. GENERAL PROVISIONS

##### A. Termination.

1. **Termination Without Cause.** Either party may terminate this Agreement without cause effective upon the conclusion of the then current Initial Term or Renewal Term, as applicable, by providing the other party with at least 60 days prior written notice of its intent to do so.

2. **Termination for Cause.** Either party may terminate this Agreement for cause at any time by providing the other party with prior written notice of the occurrence of any of the following events:

- a party fails to timely pay any amounts due and payable, provided that the nonpayment is not cured within 10 days of the notice; or
- a party violates any material provision of this Agreement, including without limit a material failure to provide required services, a breach by Member or Patrons of copyrights laws, failure to comply with any security documents or a breach of the confidentiality provisions of this Agreement, or otherwise has committed breaches of this Agreement that, in the aggregate, are material, provided that the breach(es) cannot be, or is(are) not, cured within 60 days of the notice.

3. **Survival.** All terms of this Agreement that are intended to survive termination for any reason of this Agreement will so survive, including without limit Section I.B.2; Section(s) III.B, C, D, E, F, G, H.5 and H.13; and Section D of Exhibit A.

##### B. Limited Warranty.

NetLibrary warrants that, as to any Audio Books licensed to Member under this Agreement, NetLibrary has the necessary authority to license the Audio Books to Member and to provide Platform Services to Member. NetLibrary warrants that it will use its commercially reasonable efforts to provide Platform Services as described in this Agreement.

##### C. Warranty Disclaimer.

EXCEPT AS EXPRESSLY PROVIDED IN SECTION II.B ABOVE, MEMBER'S NL WEBSITE, PLATFORM SERVICES, AND AUDIO BOOKS LICENSED UNDER THIS AGREEMENT ARE PROVIDED "AS IS" WITHOUT ANY WARRANTY OF ANY KIND AND NETLIBRARY ITS CONTENT PROVIDERS, AND CONSORTIUM EXPRESSLY DISCLAIM ALL IMPLIED WARRANTIES, INCLUDING WITHOUT LIMIT THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE. NEITHER NETLIBRARY, ITS CONTENT PROVIDERS, NOR CONSORTIUM WARRANTS, GUARANTEES OR MAKES ANY REPRESENTATIONS REGARDING THE USE, OR THE RESULTS OF THE USE, OF MEMBER'S NL WEBSITE OR AUDIO BOOKS. NO ORAL OR WRITTEN INFORMATION OR ADVICE GIVEN BY NETLIBRARY OR CONSORTIUM OR EMPLOYEES OF EITHER PARTY WILL CREATE A REPRESENTATION OR WARRANTY OR IN ANY WAY INCREASE THE SCOPE OF NETLIBRARY'S OBLIGATIONS, AND MEMBER MAY NOT RELY ON ANY SUCH INFORMATION OR ADVICE.

##### D. Indemnity.

NetLibrary will defend, indemnify, and hold Member harmless from any action based solely on a claim that Audio Books furnished and used within the scope of this Agreement infringe any copyright of



any third party, except that this indemnity will not apply to copyright claims arising from content that has been provided to NetLibrary by publishers and is provided by NetLibrary without substantive modification (except for conversion to digital format). Member will defend, indemnify, and hold NetLibrary harmless from any action based on a claim that the use by Member or its Patrons of Member's NL Website, Consortium's NL Website or Audio Books in violation of the terms of this Agreement infringes any copyrights or trade secrets of any third party.

#### E. Limitation on Liability.

Neither party will claim special, incidental, indirect, or consequential damages; including without limit lost profits, for breach of this Agreement. This limitation will also apply to any claims brought against NetLibrary's content providers. Remedies are limited to claims for amounts due, for injunctive relief only as provided, or for direct damages. A party's aggregate liability for any and all claims, losses, liabilities, and demands arising, whether for breach of contract, in tort or otherwise, are limited to the total amount of eAudio Book License Fees, and Platform Fees (collectively, "Fees") paid by Member to NetLibrary, during the 12 month period immediately preceding the date on which the claim first arose. Notwithstanding any other provision of this Agreement, the nonbreaching party may seek injunctive relief in any court of competent jurisdiction to enjoin or restrain the breaching party from continuing to do any act or commit any violation or threatened violation of this Agreement, and the prevailing party, if any, on a claim for injunctive relief is entitled to recover its reasonable attorney fees incurred in connection with that proceeding. Injunctive relief will be without prejudice to the nonbreaching party's right to also seek money damages for breach of this Agreement.

#### F. Confidential Information.

To the extent allowed by applicable law, Member agrees that it will not use or disclose information relating to (i) the terms of this Agreement, (ii) the content of reports delivered under this Agreement, (iii) pricing terms and other business arrangements governed by this Agreement and (iv) any other documents provided by NetLibrary that have a confidential, proprietary or other similar designation or should reasonably be believed to be the confidential or proprietary information of NetLibrary or its content providers. Notwithstanding the foregoing, Member may disclose the aggregated content of reports delivered under Ex.A.C.4 to other library professionals.

#### G. Payment Terms.

At NetLibrary's discretion, either NetLibrary or Consortium may invoice Member for any fees and other charges due for the purchase of Member's Unique Collection(s) under this Agreement. Consortium will bill Member for amounts due with respect to Shared Collections. All fees and charges are due and payable 30 days from the date of the related invoice. NetLibrary or Consortium has the right to charge 1.5% interest per month on any invoice that remains unpaid longer than 30 days from the date of the invoice; in addition, NetLibrary may deny Member and Patrons access to Member's NL Website or Consortium's NL Website until the unpaid invoice is paid in full.

#### H. Other Provisions.

1. Entire Agreement. All exhibits referred to in this Agreement are incorporated in this Agreement by reference. Any modification or amendment to Section(s) B. and C of Exhibit A under Section II.H.2 below will also be incorporated in this Agreement by reference. This Agreement sets forth the entire agreement between the parties with respect to the subject matter of the Agreement, merges all discussions between them and supersedes and replaces any and every other prior or contemporaneous agreement, understanding or negotiation that may have existed between NetLibrary and Member to the extent that any such agreement relates to the subject matter of the Agreement. This Agreement governs all orders for Audio Books and Platform Services placed by Member during the Term.

2. Modification or Amendment. Notwithstanding any other provision in this Agreement, NetLibrary will have the right to modify and

amend Section(s) B. and C of Exhibit A to this Agreement provided that NetLibrary provides Member with at least 30 days prior written notice; and, in this event, the modified or amended Exhibit(s) will not be effective before the end of the 30 day notice period. Any other modification or amendment of this Agreement must be in writing and signed by a duly authorized representative of each party. For clarification, no term contained in a purchase order or other similar document submitted to NetLibrary by Member will become binding on the parties unless and until the term is mutually agreed upon in a written modification or amendment to this Agreement as described above.

3. Assignment. Neither party may sell, assign, transfer or convey this Agreement or any rights and obligations without the prior written consent of the other party, which will not be unreasonably withheld. Notwithstanding the foregoing, NetLibrary reserves the right to assign or transfer this Agreement to an affiliated company or to a third party that acquires substantially all of its assets upon written notice to the Member.

4. Successors and Assigns. This Agreement will be binding upon and inure to the benefit of the parties and their respective permitted successors and assigns.

5. Governing Law, Jurisdiction and Venue. This Agreement will be governed by the laws of the State of Colorado, U.S.A. without regard to any conflict of laws provisions contained in this Agreement. NetLibrary and Member agree that any action arising from or out of the negotiations, execution, interpretation or enforcement of this Agreement may be brought in the state or federal courts located in the State of Colorado, U.S.A. Member hereby consents to jurisdiction and venue in the state and federal courts in Colorado, U.S.A.

6. Interpretation. The use of headings in this Agreement is solely for the mutual convenience of the parties and will not affect the construction.

7. Severability. If any provision of this Agreement proves to be illegal, invalid or unenforceable, the remainder of this Agreement will not be affected thereby, and in lieu of any provision of this Agreement that is illegal, invalid or unenforceable, there will be added as a part of this Agreement a provision as similar in terms to the illegal, invalid or unenforceable provision as may be possible to be legal, valid and enforceable.

8. Further Assurances. Member and NetLibrary agree to take the further actions and to execute the further documents as may be necessary or appropriate to effectuate this Agreement and the transactions contemplated in this Agreement.

9. Force Majeure. Member acknowledges that the Internet is an unsecure, unstable, unregulated, unorganized and unreliable environment, and that the ability of NetLibrary to deliver Platform Services may depend upon the Internet and equipment, software, systems, data and services provided by various telecommunications carriers, equipment manufacturers, firewall providers, encryption system developers and other vendors and third parties. Neither party will be liable for, or have the right to terminate this Agreement as a result of, any delays or failures to perform any of its obligations under the Agreement to the extent that the delays or failures are due to circumstances beyond its reasonable control, including without limit acts of God; strikes; riots; acts of war; power failures; and functions or malfunctions of the Internet, telecommunications services, firewalls, encryption systems, and security devices; or governmental regulations imposed after the Effective Date.

10. Waiver. The waiver by either party of any right granted under this Agreement will not be deemed a waiver of any other right granted under this Agreement, or a precedent for any subsequent waiver.

11. No Partnership. As to one another the parties are considered independent contractors. It is not the intention of the parties to create, nor will this Agreement be construed as creating, a partnership, joint venture, agency relationship, or other association; or render the parties liable as partners, co-venturers, agents, or principals.



12. No Third Party Beneficiaries. This Agreement is not intended to confer any benefit on any person or entity not a party to this Agreement.

13. Notices. Any notice, demand, request, consent, approval or other communication (collectively, "Notices") required or permitted to be given under this Agreement will be in writing and sent by hand delivery, special courier capable of confirming receipt, United States Mail (certified mail, return receipt requested), or facsimile or e-mail to a non-individual-specific e-mail address if receipt is confirmed. The parties acknowledge and agree that a Notice might not be deemed effective if receipt is not confirmed. Notices will be deemed given under the following rules: If hand delivered, at the time of delivery; if sent by special courier, on the third day after delivery to the courier; if mailed, on the seventh day after deposit in the United States Mail; and if sent by facsimile or e-mail to a non-individual-specific e-mail address, on the date transmitted if the sender receives confirmation that the transmission was received during the notified party's normal business hours, otherwise on the notified party's next normal business day. Notices will be sent to the following addresses:

	If to NL:	If to Member:
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#### EXHIBIT A TO LIBRARY AGREEMENT FOR AUDIO BOOK PURCHASES – PLATFORM FEE

##### A. Definitions.

4. "Limiting Access Measures" mean appropriate measures to limit the use of Audio Books through access by Patrons. Limiting Access Measures are to comply with NetLibrary's reasonable application requirements which may change from time to time and may include, but are not limited to, remote patron authentication applications, authentication through protected IP addresses, a patterned identification check and privileged user accounts. NetLibrary will consider other Limiting Access Measures on a case-by-case basis, but may reject the proposed methods if, in NetLibrary's opinion, access will not be sufficiently controlled.

5. "Platform Fee" means the fee Member pays to maintain Member's NL Website and to maintain and upgrade the Existing Platform and bandwidth. Platform Fees include Platform Services. Member may pay the Platform Fee on the basis described in this Exhibit A.

6. "Platform Services" mean NetLibrary's services related to Member's ongoing access to and use of Audio Books or Subscription(s) to Audio Books via the Internet and Member's NL Website, as further described in this Exhibit A.

3. The "Reinstatement Fee" means the fee associated with reinstating Platform Services for an Audio Book for which Platform Services were previously terminated, as further described in this Exhibit A.

##### B. Annual Platform Fee.

1. The Annual Platform Fee for an order will equal 10% of the Audio Book List Price(s) for all the Audio Book(s) in the order at the time of initial licensing.

2. Upon payment of an Annual Platform Fee, NetLibrary will host and provide Platform Services for the effected Audio Books for 1 year from the purchase date.

3. The first payment of the Annual Platform Fee for an order will be due and payable at the time the Member purchases the Audio Book Licenses, and will be included on the invoice for the corresponding Audio Book License Fees.

4. NetLibrary will calculate and invoice Annual Platform Fees for the second and subsequent years on an annualized basis on a single date each year.

5. The Reinstatement Fee for an Audio Book will equal 10% of the Audio Book List Price.

6. The Annual Platform Fee in the second and subsequent years will be reduced by the portion of the first year Annual Platform Fee attributable to any Audio Book removed from, and not reinstated to, Member's Audio Book collection as further described in this Exhibit.

	NetLibrary, a division of OCLC Online Computer Library Center, Inc.	
Address:	4888 Pearl East Circle, Suite 103	
Address:	Boulder, Colorado 80301	
Attention:	Sales Management	
Telephone:	(303) 415-2548	
Facsimile:	(303) 381-8800	
e-mail address:	sales@netlibrary.com	

14. Facsimile Copies. A copy of the signed original of this Agreement transmitted by facsimile machine will be binding on both parties and have the same force and effect as the signed original.

7. If NetLibrary elects not to continue to support the Existing Platform at any time due to technological obsolescence or cessation of third party vendor support, NetLibrary may charge Member additional fees for migrating the Audio Books for which Member is paying the Annual Platform Fee to a replacement platform, subject to any applicable limitations as set out on Exhibit A.

##### C. Platform Services

###### 1. Provision and Delivery of Platform Services.

a. If Member has paid the Platform Fee; then, subject to the terms of this Agreement, Member will receive Platform Services.

b. Platform Services include:

- establishing and administering Member's NL Website,
- hosting the Audio Books or Audio Books Collection, as applicable, on Member's NL Website, and
- providing access - to Member and Patrons - to Member's Audio Books or Audio Books Collection, as applicable, through Member's NL Website.

c. Member and Patrons will access Platform Services via Member's Internet connection, which will be Member's expense and responsibility.

d. NetLibrary will provide Platform Services for as long as Member continues to pay the Platform Fee, NetLibrary continues to support the Existing Platform, and Member has not notified NetLibrary to remove the Audio Books from Member's NL Website.

###### e. Removing and Reinstating Audio Books.

i. Member may elect to have any Audio Books removed from Member's NL Website, by providing NetLibrary with written notice of the election within 60 days of the annualized date on which Platform Fees are calculated and invoiced.

ii. Member may elect to have any Audio Books reinstated to Member's NL Website, by providing NetLibrary with written notice of the election within 60 days of the annualized date on which Platform Fees are calculated and invoiced and by paying the applicable Reinstatement Fee as further described in Exhibit A. Platform Fees for reinstated Audio Books are due and payable on the reinstatement date.

f. Notwithstanding any other provision of this Agreement, if NetLibrary terminates this Agreement for cause under Section II.A.2. of the Agreement, then NetLibrary's obligation to provide Audio Books and Platform Services will expire.

###### 2. Support for NL Website and Member's NL Website.

- a. **Existing Platform.** At the time this Agreement is executed, the NL Website, the Member's NL Website, and the Consortium's NL Website are supported by NetLibrary's existing electronic bookshelf technology, which includes a third party operating system, third party database management software, and proprietary NetLibrary software (collectively, the "Existing Platform"). NetLibrary will not charge any fees to continue to support the operation of the Existing Platform, except as may be provided in this Agreement.
- b. **Platform Commitment Date.** Initially, the "Platform Commitment" Date will be July 1, 2012. However, NetLibrary may publish or announce a specific date as the Platform Commitment Date or a change in the practice of determining the Platform Commitment Date, provided that the publication or announcement will only be applicable to purchases of Audio Books licenses made after the date of the publication or announcement.
- c. **Migration.** If the Existing Platform becomes technologically obsolete and/or third party vendors cease to support third party components of the Existing Platform before the Platform Commitment Date; then, except as may be provided in this Agreement, NetLibrary will not charge Member any additional fees to support the Existing Platform until the Platform Commitment Date or to migrate Member's Audio Books content to a replacement platform before the Platform Commitment Date. If the Existing Platform becomes technologically obsolete and/or third party vendors cease to support third party components of the Existing Platform after the Platform Commitment Date, then NetLibrary may charge fees to support a replacement platform or to migrate Member's Audio Books to a replacement platform.
3. **Patron Access.**  
Member will implement and maintain Limiting Access Measures, based on NetLibrary's standard systems, which will control Patrons' access to Member's NL Website.
4. **Reports.**  
Payment of the Platform Fees entitles Member to the standard reports offered by NetLibrary. These reports may be modified by NetLibrary from time to time and may include without limit: current discount schedule, transaction history, owned Audio Books, popular Audio Books, Audio Books not owned, all Audio Books, new Audio Books, activity by subject area and activity by title. Nonstandard reports may be developed for a fee on a case-by-case basis.
- D. Member and Patron Usage.**
1. **Limiting Access Measures.** Member will be solely responsible for determining which Patrons will have access to Member's NL Website. Member and Consortium will be jointly responsible for determining which Patrons will have access to Consortium's NL Website, as applicable, under this Agreement. Member agrees to implement Limiting Access Measures within a reasonable time frame. NetLibrary, in its sole discretion, may discontinue Member's access to Member's NL Website and Consortium's NL Website, as applicable, if Member fails to implement Limiting Access Measures within a reasonable timeframe. Except for standard fees charged by Member to Patrons, Member will not charge any Patron for use of Member's NL Website.
2. **Terms of Use.** The use of Member's NL Website and Consortium's NL Website, as applicable, by Member and Patrons will be governed by the "Terms of Use" currently available at <http://www.netlibrary.com/TermsOfUse.aspx>, as they may be amended from time to time, which are incorporated in this Agreement by reference. If a Member or a Patron violates the Terms of Use, NetLibrary reserves the right, in its sole discretion, to suspend or terminate Member's or the Patron's access to and use of Member's NL Website and Consortium's NL Website, as applicable. At its sole option, NetLibrary may notify Member of any violation by a Patron of the Terms of Use, and in the event, also at its sole option, NetLibrary may grant Member three days to attempt to correct the violation by a Patron and NetLibrary will not terminate the Patron's access to and use of Member's NL Website and Consortium's NL Website if the violation is corrected within the three day period. Member acknowledges and agrees that, in the case of repeated or persistent violations, NetLibrary may not provide the aforementioned notice and correction period to Member. Repeated or persistent violations of the Terms of Use by Member or Patrons may be cause for termination of this Agreement by NetLibrary.
3. **Tools.** Member will not use, implement or authorize use of any computerized or automated tool or application to search, index, test or otherwise obtain information from Member's NL Website and Consortium's NL Website, as applicable, including without limit any "spidering" or web crawler application (collectively, "Tools"), without obtaining the prior written approval of NetLibrary. NetLibrary will not unreasonably withhold this approval, provided that the proposed use of Tools does not (i) present a risk of interfering with use of NL Website by Patrons or other NetLibrary end-users; (ii) degrade or impair the performance of NL Website; (iii) cause NetLibrary to violate its agreements with its other end-users, its publishers or other third parties; or (iv) constitute a violation of applicable law, including without limit U.S. copyright law. Member acknowledges and agrees that NetLibrary may from time to time implement controls on Member's NL Website to regulate or restrict the use of Tools.
4. **Shared Collections.**
- a. **Shared Collection(s) Access.** NetLibrary will only permit access to and use of Consortium's Shared Collection(s) by a Consortium Member and the Member's Patrons if: (i) Consortium has executed a Consortium Agreement with NetLibrary, (ii) Consortium has given NetLibrary written notice that Consortium is willing to allow the Member to access a particular Shared Collection, and (iii) the Consortium Member has executed an Agreement. Until all of these conditions have been satisfied, NetLibrary will have no obligation to permit any Member of Consortium to access any Shared Collection of Consortium.
- b. **Shared Collection(s) Parameters.** At the time of purchase the Shared Collection closes, NetLibrary will provide access to a Consortium Shared Collection to a Consortium Member that Consortium has authorized to access the Consortium Shared Collection by giving NetLibrary written notice within 30 days after the Consortium Shared Collection closes. NetLibrary will not provide access to a Consortium Shared Collection to any Members that Consortium has not authorized to access the Shared Collection by giving NetLibrary written notice within 30 days after the Shared Collection closes.



## EXHIBIT B TO LIBRARY AGREEMENT FOR AUDIO BOOK PURCHASES -- GUIDELINES FOR THE USE AND TRANSFER OF OCLC-DERIVED RECORDS

Revision of November 16, 1987

## I. GUIDELINES

(See Definitions in Part II below)

1. Each member and nonmember library may use records without restriction, and may transfer records of its own holdings without restriction to other libraries.
2. In addition to transfers to libraries, each member and nonmember library may transfer records of its own holdings without restriction, to
  - (a) member networks, (b) state and multi-state library agencies and (c) all other noncommercial firms.
    - a. Member networks may produce and transfer to any member library, copies on magnetic tape of records used or inserted into the OCLC database by the library. Each member network also may process records of the holdings of any member or nonmember library which has employed and agreed to pay it for that service, provided the member network has first signed either an individual agreement with the library, or a general agreement with OCLC, containing measures agreed upon by OCLC and the member network for protection of the records it has been employed to process. Any other use and transfer of records by member networks will be as provided in separate understandings with OCLC.
    - b. The use and transfer of records by library systems or projects operated by or under the aegis of one or more state or national library agencies will be as provided in separate understandings with OCLC. Such understandings may include (i) arrangements to incorporate state or national bibliographic databases into the OCLC system, (ii) paid-up licenses to use records in state or national programs (e.g., by means of payments for OCLC multi-institution tapes) and/or (iii) any other understandings that will facilitate state or national programs as well as the maintenance and enhancement of the OCLC database.
    - c. The use and transfer of records by any other organizations to which transfers are made under this Guideline 2 will be as provided in separate understandings with OCLC.
3. In addition, each member and nonmember library may transfer records of its own holdings to commercial firms which the library has employed and agreed to pay to process such records, provided that each commercial firm has first signed an individual agreement with the library, or OCLC has advised the library that the commercial firm has signed a general agreement with OCLC, in either case containing measures agreed upon by OCLC and the commercial firm for protection of the records it has been employed to process. In addition, each member and nonmember library may make any other transfers of records to commercial firms, subject to prior written agreements with OCLC. However, there is no requirement for prior written agreements (a) for transfers made under Guideline 1 above to libraries operated by commercial firms or (b) for transfers to commercial firms by former OCLC member libraries of records of their holdings, so long as the libraries maintain no continuing user status with OCLC.
4. When a nonmember organization makes bibliographic information available to OCLC which is subject to usage or transfer restrictions imposed by such nonmember organization, and OCLC nevertheless elects to accept the information for addition to the OCLC database, OCLC will notify libraries to which it makes the information available, and rights to use and transfer records based on such information will be subject to the same restrictions.
5. When transfers under Guideline 1 above are made to machine-readable union catalogs accessible by nonmember libraries, it is requested that machine-readable copies of the records of such union catalogs be submitted to OCLC. OCLC, at its own expense, will have the right to add such records to its database for all uses consistent with its chartered purposes.
6. The Guidelines above apply to all uses and transfers of records except where a mutually acceptable agreement establishing broader or narrower rights is made with OCLC relating to a specific product or service.

## II. DEFINITIONS

1. The term "member library" means a general member of OCLC as defined in its Code of Regulations.
2. The term "nonmember library" means any library other than a member library.
3. A "member network" is an OCLC-affiliated regional, state or multi-state library network organization which is in contract with OCLC to provide OCLC services and products, or to assist OCLC to provide such services and products, to general members of OCLC.
4. A "commercial firm" is any organization permitted, under applicable law, to operate on a for-profit basis.
5. The term "records" means bibliographic records and holdings data (including copies thereof) derived from the OCLC database, including derivative works made from such records, and either received in machine-readable form or converted by the transferee into machine-readable form. The term also includes such records when held only in eye-readable form, in the case of proposed transfers to commercial firms. However, records do not include, as to any member or nonmember library (a) bibliographic records designated in the OCLC database as original cataloging by such member or nonmember library and (b) bibliographic records derived by such member or nonmember library from sources other than the OCLC database and to copies of which in the OCLC database its holdings symbol has been attached by tapelabeling. Such excluded records are freely transferable and are not dealt with in these Guidelines. OCLC-derived records held only in eye-readable form are freely transferable except to commercial firms.
6. The terms "transfer" and "transfer of records" refer to all sales, exchanges, gifts, sharing and other transfers, and all online access except online access provided to end-user patrons of a library in authorized possession of the records.

## EXHIBIT F TO CONSORTIUM AGREEMENT FOR AUDIO BOOK PURCHASES - SOLINET SUBSCRIBER AGREEMENT

Southeastern Library Network, Inc. (SOLINET) will include \_\_\_\_\_

("Licensee") as a "Member" library in its "Consortium Audio Book Agreement" with NetLibrary, a division of OCLC Online Computer Library Center, Inc. ("NetLibrary") in order to allow Licensee access to SOLINET's Shared Collection(s) via Consortium's nL Website. If Licensee so desires, SOLINET will also provide ordering and billing for individual libraries for Unique Collection(s) and individual ebooks via Member's nL Website. Licensee agrees to the terms and conditions specified in the "Consortium Audio Book Agreement" and the "Library Audio Book Agreement: SOLINET Member Terms and Conditions". Certain terms that are capitalized but not defined in this agreement have the same meaning as is attributed to them in the "Consortium Audio Book Agreement". These agreements represent the agreements for access to and use of the Shared Collection(s) and Unique Collection(s), if applicable, and the related Platform Services. Licensee agrees to abide by all such terms and conditions, as such may be revised from time to time, as if such were fully set forth herein.

1. This agreement is dependent upon the "Consortium Audio Book Agreement" remaining in effect between SOLINET and NetLibrary. SOLINET will notify the Licensee prior to the expiration of the "Consortium Audio Book Agreement" so that Licensee can make other arrangements for access.
2. Licensee agrees to access and use the SOLINET Shared Collection(s) and purchased Unique Collection(s) and individual Audio Books in accordance with the "Library Audio Book Agreement: SOLINET Member Terms and Conditions". Licensee will exercise reasonable good faith efforts to inform Patrons of restrictions on use of NetLibrary.
3. Licensee agrees to pay SOLINET fees as invoiced. All charges shall be due thirty (30) days from the date of receipt of the invoice reflecting such charges. SOLINET will advise NetLibrary of Licensee's failure to abide by their terms, including payment related matters. NetLibrary will decide whether to continue service in these instances. A Licensee participating through SOLINET in the Unique Collection(s) is not eligible for credits related to a possible overlap in titles with those in the SOLINET Shared Collection(s).
4. Licensee will fill out the necessary order information.
5. The Agreement shall be governed by and construed in accordance with the State of \_\_\_\_\_.
6. Warranty Disclaimer - EXCEPT AS EXPRESSLY PROVIDED OTHERWISE HEREIN, CONSORTIUM'S NL WEBSITE, MEMBER'S NL WEBSITE(S), PLATFORM SERVICES AND ALL AUDIO BOOKS LICENSED ARE PROVIDED "AS IS" WITHOUT ANY WARRANTY OF ANY KIND, AND NETLIBRARY, ITS CONTENT PROVIDERS AND SOLINET EXPRESSLY DISCLAIM ALL IMPLIED WARRANTIES, INCLUDING WITHOUT LIMIT THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE. NEITHER NETLIBRARY, ITS CONTENT PROVIDERS, NOR SOLINET WARRANTS, GUARANTEES OR MAKES ANY REPRESENTATIONS REGARDING THE USE, OR THE RESULTS OF THE USE, OF CONSORTIUM'S NL WEBSITE, MEMBER'S NL WEBSITE OR AUDIO BOOKS. NO ORAL OR WRITTEN INFORMATION OR ADVICE GIVEN BY NETLIBRARY, ITS EMPLOYEES OR SOLINET WILL CREATE A REPRESENTATION OR WARRANTY OR IN ANY WAY INCREASE THE SCOPE OF NETLIBRARY'S OBLIGATIONS HEREUNDER, AND LICENSEE MAY NOT RELY ON ANY SUCH INFORMATION OR ADVICE.
7. Confidential Information. To the extent allowed by applicable law, Licensee agrees that it shall not use or disclose information relating to (i) the terms of this Agreement, (ii) the content of reports delivered hereunder, or (iii) pricing terms or arrangements under this Agreement; provided, that Licensee may disclose such information to its permitted Member organizations and Patrons subject to the restrictions set forth above with respect to further disclosure by such Members and Patrons or as required by law.
8. In the event that NetLibrary is unable to fulfill its responsibilities SOLINET or its permitted designee is not required to assume the responsibility for providing this service.

This Agreement shall take effect upon the latest date of execution below by duly authorized representatives of Licensee and shall automatically renew on the first day of \_\_\_\_\_ annually, except as otherwise provided by written notification from SOLINET to Licensee, or from the Licensee to SOLINET.

This Agreement is valid and enforceable only if sufficient funds are made available to the state institutions by their respective state legislatures for the purpose of this program. It is mutually agreed that if the state legislature does not appropriate funds for the program, this Agreement shall be terminated or amended to reflect any reduction of funds. The decision to continue with the Agreement must be made no later than thirty (30) days after the new fiscal year affected by the legislature funding.

Library:	Name of Library	Consortium:	SOUTHEASTERN LIBRARY NETWORK, INC.
Signature for Library:	_____	Signature for Consortium:	_____
Name (please print or type):	_____	Name (please print or type):	_____
Title:	_____	Title:	_____
Date:	_____	Date:	_____



## LIBRARY AGREEMENT FOR AUDIO BOOK PURCHASES - SOLINET MEMBER TERMS AND CONDITIONS

Library Agreement for Audio Book Purchases - Solinet Member Terms and Conditions .....	1
I. DEFINITIONS; AUDIO BOOK LICENSES .....	1
A. Definitions .....	1
B. Audio Book Licenses .....	1
II. GENERAL PROVISIONS .....	2
A. Termination .....	2
B. Limited Warranty .....	2
C. Warranty Disclaimer .....	2
D. Indemnity .....	2
E. Limitation on Liability .....	2
F. Confidential Information .....	3
G. Payment Terms .....	3
H. Other Provisions .....	3
Exhibit A to Library Agreement for Audio Book Purchases - Platform Fee .....	4
A. Definitions .....	4
B. Annual Platform Fee .....	4
C. Platform Services .....	4
D. Member and Patron Usage .....	5
Exhibit B to Library Agreement for Audio Book Purchases - Guidelines for the Use and Transfer of OCLC-Derived Records .....	6

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed by their duly authorized representatives, to be effective as of the Effective Date, as set forth below.

Member:

By:

Name:

Title:

Date:

NetLibrary: NetLibrary, a division of OCLC Online  
Computer Library Center, Inc.

By:

Name:

Title:

Date:

Rick Schwietzman

Vice President and Chief Financial  
Officer

THIS LIBRARY AGREEMENT FOR AUDIO BOOK PURCHASES (this "Agreement") is by and between ("Member") and NetLibrary, a division of OCLC Online Computer Library Center, Inc., an Ohio nonprofit corporation ("NetLibrary").

WHEREAS, NetLibrary has acquired certain rights to convert various books and other works to electronic format and to market and distribute the works as converted as Audio Books, and NetLibrary operates an electronic library service for hosting and managing Audio Books and other materials over the Internet.

WHEREAS, NetLibrary and Solinet ("Consortium") have entered into a consortium Audio Book agreement (the "Consortium Audio Book Agreement").

WHEREAS, Consortium has given NetLibrary written notice that Consortium is willing to allow Member to access a particular Shared Collection and Member has been designated a "Member" of Consortium as defined in the Consortium Audio Book Agreement (for clarification, capitalized terms used herein and not defined herein will have the meanings assigned to them in the applicable Consortium Audio Book Agreement).

WHEREAS, Member desires to purchase licenses to certain Audio Books, as part of the discrete Shared or Unique Collection; subject to the terms and conditions described in this Agreement.

IN CONSIDERATION OF THE MUTUAL COVENANTS AND OBLIGATIONS SET FORTH BELOW, the parties agree as follows.

#### I. DEFINITIONS; AUDIO BOOK LICENSES

##### A. Definitions.

Terms defined within this Agreement have the respective meanings attributed to them throughout this Agreement or in this Section I.A. Any defined term may be used in the singular and in the plural, as appropriate in the context.

- "Audio Books" mean NetLibrary's electronic versions of certain Audio Books and other works in which NetLibrary has acquired certain rights.
- The "Audio Books License" means a license to use the relevant Audio Books(s).
- The "Audio Books License Fee" means a one-time-only fee for Member's license to use the relevant Audio Books(s) and is determined by subtracting the applicable Discount from the Audio Books List Price.
- The "Audio Books List Price" means the price established by NetLibrary for the license to use the relevant Audio Books(s).
- "Discount" means the percentage of the Audio Books List Price used in determining the Audio Books License Fee. Discounts do not apply to Platform Services.
- The "Effective Date" of this Agreement means the latest execution date set forth on the signature block below or the date on which Member or any Patron may first access Audio Books, whichever date occurs first.
- "Member's NL Website" means the Website operated by NetLibrary and open to Member and Patrons in order to access and use Audio Books licensed to Member.
- A "MARC Record" means an electronic record containing metadata and other relevant information about the corresponding Audio Book.
- "NL Website" means the Website operated by NetLibrary and open to the general public in order to provide information about NetLibrary's products and services.
- "Patrons" mean Member's registered faculty, members, patrons, students, and other authorized users, including both

onsite users and remote users. Patrons are individuals and may not be corporations or other entities.

11. The "Shared Collection(s)" means a collection(s) of Audio Books licensed to Consortium for access and use by Consortium and its participating Members and Patrons (as such terms are defined in the applicable Consortium Audio Book Agreement) under the terms and conditions of the Consortium Audio Book Agreement with respect to Shared Collection(s) and this Agreement; nothing in this Agreement is intended to grant Member any rights in the Shared Collection(s) without completion of appropriate paperwork and payment of related fees.

12. Subject to Section II.A below, the "Term" of this Agreement includes an "Initial Term," which commences on the Effective Date and continues in effect for one year, and any "Renewal Term(s)," which are automatic one year extensions of this Agreement that commence on each anniversary of the Effective Date unless this Agreement is terminated according to Section II.A.1 below.

13. A "Unique Collection" means a collection of Audio Books chosen by a Member and licensed to the Member under the terms and conditions of this Agreement. The Unique Collection remains separate from the Shared Collection(s). The Unique Collection is only accessible by Member and its Patrons; the Unique Collection is not accessible by Consortium or by nonpurchasing Members and Patrons (as such terms are defined in the applicable Consortium Audio Book Agreement).

#### B. Audio Book Licenses.

##### 1. Purchase of Licenses.

###### a. Audio Books.

i. During the Term of the Agreement, Member may select and purchase Audio Book Licenses in accordance with NetLibrary's then current ordering practices. NetLibrary will make the Audio Books Licenses available to Member according to NetLibrary's agreements with its content providers, and partners. Each final order of Audio Book Licenses is incorporated in this Agreement by reference.

ii. Member designates Consortium as its agent for acquiring rights to Audio Books on behalf of Member under the Consortium Audio Book Agreement and with the authority to act, including without limit ordering Audio Books, on behalf of Member under this Agreement and the Consortium Audio Book Agreement. NetLibrary is authorized to rely on this designation and to recognize Consortium as an agent of Member. Member agrees to comply with and be bound by all the provisions of the Consortium Audio Book Agreement applicable to "Members" as defined in the Consortium Audio Book Agreement.

b. **MARC Records.** As part of the relevant Platform Fee; NetLibrary will provide Member with one copy of the MARC Record that corresponds to each Audio Books License purchased by Member for the Unique Collection. NetLibrary and Member agree that all MARC Records are the property of OCLC; Member may use MARC Records only for its own internal purposes as further described in Exhibit B. NetLibrary will replace defective MARC Records if Member notifies NetLibrary of the defect within 90 days of NetLibrary's delivery of the MARC Record to Member and NetLibrary concurs that the MARC Record is defective.

2. **Copyrighted Works.** Member acknowledges and agrees that the copyright to each Audio Book is owned by or licensed to NetLibrary and the respective publisher thereof. All Rights Reserved. By purchasing a license to an Audio Book, Member obtains certain rights to access and use a copy of the Audio Book under this Agreement, but Member does not obtain or own any rights in the copyrights or any other intellectual property rights that may be associated with the Audio Book. Member agrees that it is responsible for all use of Audio Books by Member and its Patrons, and that any use of Audio Books by Member and its Patrons is governed by and will comply with applicable laws, including without limit U.S. copyright laws. Member acknowledges that it and its Patrons have no right to make copies of any Audio Book,

or any portions thereof, except to the extent permitted by applicable copyright laws and neither it nor Patrons have any right to grant any third parties the right to use any Audio Book (for purposes of this sentence, third parties does not include Patrons).

#### II. GENERAL PROVISIONS

##### A. Termination.

1. **Termination Without Cause.** Either party may terminate this Agreement without cause effective upon the conclusion of the then current Initial Term or Renewal Term, as applicable, by providing the other party with at least 60 days prior written notice of its intent to do so.

2. **Termination for Cause.** Either party may terminate this Agreement for cause at any time by providing the other party with prior written notice of the occurrence of any of the following events:

- a party fails to timely pay any amounts due and payable, provided that the nonpayment is not cured within 10 days of the notice; or
- a party violates any material provision of this Agreement, including without limit a material failure to provide required services, a breach by Member or Patrons of copyrights laws, failure to comply with any security documents or a breach of the confidentiality provisions of this Agreement, or otherwise has committed breaches of this Agreement that, in the aggregate, are material, provided that the breach(es) cannot be, or is(are) not, cured within 60 days of the notice.

3. **Survival.** All terms of this Agreement that are intended to survive termination for any reason of this Agreement will so survive, including without limit Section I.B.2; Section(s) III.B, C, D, E, F, G, H.5 and H.13; and Section D of Exhibit A.

##### B. Limited Warranty.

NetLibrary warrants that, as to any Audio Books licensed to Member under this Agreement, NetLibrary has the necessary authority to license the Audio Books to Member and to provide Platform Services to Member. NetLibrary warrants that it will use its commercially reasonable efforts to provide Platform Services as described in this Agreement.

##### C. Warranty Disclaimer.

EXCEPT AS EXPRESSLY PROVIDED IN SECTION II.B ABOVE, MEMBER'S NL WEBSITE, PLATFORM SERVICES, AND AUDIO BOOKS LICENSED UNDER THIS AGREEMENT ARE PROVIDED "AS IS" WITHOUT ANY WARRANTY OF ANY KIND AND NETLIBRARY ITS CONTENT PROVIDERS, AND CONSORTIUM EXPRESSLY DISCLAIM ALL IMPLIED WARRANTIES, INCLUDING WITHOUT LIMIT THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE. NEITHER NETLIBRARY, ITS CONTENT PROVIDERS, NOR CONSORTIUM WARRANTS, GUARANTEES OR MAKES ANY REPRESENTATIONS REGARDING THE USE, OR THE RESULTS OF THE USE, OF MEMBER'S NL WEBSITE OR AUDIO BOOKS. NO ORAL OR WRITTEN INFORMATION OR ADVICE GIVEN BY NETLIBRARY OR CONSORTIUM OR EMPLOYEES OF EITHER PARTY WILL CREATE A REPRESENTATION OR WARRANTY OR IN ANY WAY INCREASE THE SCOPE OF NETLIBRARY'S OBLIGATIONS, AND MEMBER MAY NOT RELY ON ANY SUCH INFORMATION OR ADVICE.

##### D. Indemnity.

NetLibrary will defend, indemnify, and hold Member harmless from any action based solely on a claim that Audio Books furnished and used within the scope of this Agreement infringe any copyright of any third party, except that this indemnity will not apply to copyright claims arising from content that has been provided to NetLibrary by publishers and is provided by NetLibrary without substantive modification (except for conversion to digital format). Member will defend, indemnify, and hold NetLibrary harmless from any action based on a claim that the use by Member or its Patrons of Member's NL Website, Consortium's NL Website or Audio Books in violation of the terms of this Agreement infringes any copyrights or trade secrets of any third party.



E. Limitation on Liability.

Neither party will claim special, incidental, indirect, or consequential damages; including without limit lost profits, for breach of this Agreement. This limitation will also apply to any claims brought against NetLibrary's content providers. Remedies are limited to claims for amounts due, for injunctive relief only as provided, or for direct damages. A party's aggregate liability for any and all claims, losses, liabilities, and demands arising, whether for breach of contract, in tort or otherwise, are limited to the total amount of eAudio Book License Fees, and Platform Fees (collectively, "Fees") paid by Member to NetLibrary, during the 12 month period immediately preceding the date on which the claim first arose. Notwithstanding any other provision of this Agreement, the nonbreaching party may seek injunctive relief in any court of competent jurisdiction to enjoin or restrain the breaching party from continuing to do any act or commit any violation or threatened violation of this Agreement, and the prevailing party, if any, on a claim for injunctive relief is entitled to recover its reasonable attorney fees incurred in connection with that proceeding. Injunctive relief will be without prejudice to the nonbreaching party's right to also seek money damages for breach of this Agreement.

F. Confidential Information.

To the extent allowed by applicable law, Member agrees that it will not use or disclose information relating to (i) the terms of this Agreement, (ii) the content of reports delivered under this Agreement, (iii) pricing terms and other business arrangements governed by this Agreement and (iv) any other documents provided by NetLibrary that have a confidential, proprietary or other similar designation or should reasonably be believed to be the confidential or proprietary information of NetLibrary or its content providers. Notwithstanding the foregoing, Member may disclose the aggregated content of reports delivered under Ex.A.C.4 to other library professionals.

G. Payment Terms.

At NetLibrary's discretion, either NetLibrary or Consortium may invoice Member for any fees and other charges due for the purchase of Member's Unique Collection(s) under this Agreement. Consortium will bill Member for amounts due with respect to Shared Collections. All fees and charges are due and payable 30 days from the date of the related invoice. NetLibrary or Consortium has the right to charge 1.5% interest per month on any invoice that remains unpaid longer than 30 days from the date of the invoice; in addition, NetLibrary may deny Member and Patrons access to Member's NL Website or Consortium's NL Website until the unpaid invoice is paid in full.

H. Other Provisions.

1. Entire Agreement. All exhibits referred to in this Agreement are incorporated in this Agreement by reference. Any modification or amendment to Section(s) B. and C of Exhibit A under Section II.H.2 below will also be incorporated in this Agreement by reference. This Agreement sets forth the entire agreement between the parties with respect to the subject matter of the Agreement, merges all discussions between them and supersedes and replaces any and every other prior or contemporaneous agreement, understanding or negotiation that may have existed between NetLibrary and Member to the extent that any such agreement relates to the subject matter of the Agreement. This Agreement governs all orders for Audio Books and Platform Services placed by Member during the Term.
2. Modification or Amendment. Notwithstanding any other provision in this Agreement, NetLibrary will have the right to modify and amend Section(s) B. and C of Exhibit A to this Agreement provided that NetLibrary provides Member with at least 30 days prior written notice; and, in this event, the modified or amended Exhibit(s) will not be effective before the end of the 30 day notice period. Any other modification or amendment of this Agreement must be in writing and signed by a duly authorized representative of each party. For clarification, no term contained in a purchase order or other similar document submitted to NetLibrary by Member will become binding on the parties unless and until the

term is mutually agreed upon in a written modification or amendment to this Agreement as described above.

3. Assignment. Neither party may sell, assign, transfer or convey this Agreement or any rights and obligations without the prior written consent of the other party, which will not be unreasonably withheld. Notwithstanding the foregoing, NetLibrary reserves the right to assign or transfer this Agreement to an affiliated company or to a third party that acquires substantially all of its assets upon written notice to the Member.
4. Successors and Assigns. This Agreement will be binding upon and inure to the benefit of the parties and their respective permitted successors and assigns.
5. Governing Law, Jurisdiction and Venue. This Agreement will be governed by the laws of the State of Colorado, U.S.A. without regard to any conflict of laws provisions contained in this Agreement. NetLibrary and Member agree that any action arising from or out of the negotiations, execution, interpretation or enforcement of this Agreement may be brought in the state or federal courts located in the State of Colorado, U.S.A. Member hereby consents to jurisdiction and venue in the state and federal courts in Colorado, U.S.A.
6. Interpretation. The use of headings in this Agreement is solely for the mutual convenience of the parties and will not affect the construction.
7. Severability. If any provision of this Agreement proves to be illegal, invalid or unenforceable, the remainder of this Agreement will not be affected thereby, and in lieu of any provision of this Agreement that is illegal, invalid or unenforceable, there will be added as a part of this Agreement a provision as similar in terms to the illegal, invalid or unenforceable provision as may be possible to be legal, valid and enforceable.
8. Further Assurances. Member and NetLibrary agree to take the further actions and to execute the further documents as may be necessary or appropriate to effectuate this Agreement and the transactions contemplated in this Agreement.
9. Force Majeure. Member acknowledges that the Internet is an insecure, unstable, unregulated, unorganized and unreliable environment, and that the ability of NetLibrary to deliver Platform Services may depend upon the Internet and equipment, software, systems, data and services provided by various telecommunications carriers, equipment manufacturers, firewall providers, encryption system developers and other vendors and third parties. Neither party will be liable for, or have the right to terminate this Agreement as a result of, any delays or failures to perform any of its obligations under the Agreement to the extent that the delays or failures are due to circumstances beyond its reasonable control, including without limit acts of God; strikes; riots; acts of war; power failures; and functions or malfunctions of the Internet, telecommunications services, firewalls, encryption systems, and security devices; or governmental regulations imposed after the Effective Date.
10. Waiver. The waiver by either party of any right granted under this Agreement will not be deemed a waiver of any other right granted under this Agreement, or a precedent for any subsequent waiver.
11. No Partnership. As to one another the parties are considered independent contractors. It is not the intention of the parties to create, nor will this Agreement be construed as creating, a partnership, joint venture, agency relationship, or other association; or render the parties liable as partners, co-venturers, agents, or principals.
12. No Third Party Beneficiaries. This Agreement is not intended to confer any benefit on any person or entity not a party to this Agreement.
13. Notices. Any notice, demand, request, consent, approval or other communication (collectively, "Notices") required or permitted to be given under this Agreement will be in writing and sent by hand delivery, special courier capable of confirming receipt, United States Mail (certified mail, return receipt requested), or facsimile or e-mail to a non-individual-specific e-mail address if receipt is confirmed. The parties acknowledge and agree that a



Notice might not be deemed effective if receipt is not confirmed. Notices will be deemed given under the following rules: if hand delivered, at the time of delivery; if sent by special courier, on the third day after delivery to the courier; if mailed, on the seventh day after deposit in the United States Mail; and if sent by facsimile or e-mail to a non-individual-specific e-mail address, on the date transmitted if the sender receives confirmation that the transmission was received during the notified party's normal business hours, otherwise on the notified party's next normal business day. Notices will be sent to the following addresses:

	If to NL:	If to Member:
	NetLibrary, a division of OCLC Online Computer Library Center, Inc.	
Address:	4888 Pearl East Circle, Suite 103	

Address:	Boulder, Colorado 80301	
Attention:	Sales Management	
Telephone:	(303) 415-2548	
Facsimile:	(303) 381-8600	
e-mail address:	sales@netlibrary.com	

14. **Facsimile Copies.** A copy of the signed original of this Agreement transmitted by facsimile machine will be binding on both parties and have the same force and effect as the signed original.

#### EXHIBIT A TO LIBRARY AGREEMENT FOR AUDIO BOOK PURCHASES – PLATFORM FEE

##### A. Definitions.

1. "**Limiting Access Measures**" mean appropriate measures to limit the use of Audio Books through access by Patrons. Limiting Access Measures are to comply with NetLibrary's reasonable application requirements which may change from time to time and may include, but are not limited to, remote patron authentication applications, authentication through protected IP addresses, a patterned identification check and privileged user accounts. NetLibrary will consider other Limiting Access Measures on a case-by-case basis, but may reject the proposed methods if, in NetLibrary's opinion, access will not be sufficiently controlled.
2. "**Platform Fee**" means the fee Member pays to maintain Member's NL Website and to maintain and upgrade the Existing Platform and bandwidth. Platform Fees include Platform Services. Member may pay the Platform Fee on the basis described in this Exhibit A.
3. "**Platform Services**" mean NetLibrary's services related to Member's ongoing access to and use of Audio Books or Subscription(s) to Audio Books via the Internet and Member's NL Website, as further described in this Exhibit A.
3. The "**Reinstatement Fee**" means the fee associated with reinstating Platform Services for an Audio Book for which Platform Services were previously terminated, as further described in this Exhibit A.

##### B. Annual Platform Fee.

1. The Annual Platform Fee for an order will equal 10% of the Audio Book List Price(s) for all the Audio Book(s) in the order at the time of initial licensing.
2. Upon payment of an Annual Platform Fee, NetLibrary will host and provide Platform Services for the effected Audio Books for 1 year from the purchase date.
3. The first payment of the Annual Platform Fee for an order will be due and payable at the time the Member purchases the Audio Book Licenses, and will be included on the invoice for the corresponding Audio Book License Fees.
4. NetLibrary will calculate and invoice Annual Platform Fees for the second and subsequent years on an annualized basis on a single date each year.
5. The Reinstatement Fee for an Audio Book will equal 10% of the Audio Book List Price.
6. The Annual Platform Fee in the second and subsequent years will be reduced by the portion of the first year Annual Platform Fee attributable to any Audio Book removed from, and not reinstated to, Member's Audio Book collection as further described in this Exhibit.
7. If NetLibrary elects not to continue to support the Existing Platform at any time due to technological obsolescence or cessation of third party vendor support, NetLibrary may charge Member additional fees for migrating the Audio Books for which Member is paying the Annual Platform Fee to a replacement platform, subject to any applicable limitations as set out on Exhibit A.

##### C. Platform Services

###### 1. Provision and Delivery of Platform Services.

- a. If Member has paid the Platform Fee; then, subject to the terms of this Agreement, Member will receive Platform Services.
- b. Platform Services include:
  - i. establishing and administering Member's NL Website,
  - ii. hosting the Audio Books or Audio Books Collection, as applicable, on Member's NL Website, and
  - iii. providing access - to Member and Patrons - to Member's Audio Books or Audio Books Collection, as applicable, through Member's NL Website.
- c. Member and Patrons will access Platform Services via Member's Internet connection, which will be Member's expense and responsibility.
- d. NetLibrary will provide Platform Services for as long as Member continues to pay the Platform Fee, NetLibrary continues to support the Existing Platform, and Member has not notified NetLibrary to remove the Audio Books from Member's NL Website.

###### e. Removing and Reinstating Audio Books.

- i. Member may elect to have any Audio Books removed from Member's NL Website, by providing NetLibrary with written notice of the election within 60 days of the annualized date on which Platform Fees are calculated and invoiced.
  - ii. Member may elect to have any Audio Books reinstated to Member's NL Website, by providing NetLibrary with written notice of the election within 60 days of the annualized date on which Platform Fees are calculated and invoiced and by paying the applicable Reinstatement Fee as further described in Exhibit A. Platform Fees for reinstated Audio Books are due and payable on the reinstatement date.
- f. Notwithstanding any other provision of this Agreement, if NetLibrary terminates this Agreement for cause under Section II.A.2. of the Agreement, then NetLibrary's obligation to provide Audio Books and Platform Services will expire.

###### 2. Support for NL Website and Member's NL Website.

- a. **Existing Platform.** At the time this Agreement is executed, the NL Website, the Member's NL Website, and the Consortium's NL Website are supported by NetLibrary's existing electronic bookshelf technology, which includes a third party operating system, third party database management software, and proprietary NetLibrary software (collectively, the "Existing Platform"). NetLibrary will not charge any fees to continue to support the operation of the Existing Platform, except as may be provided in this Agreement.
- b. **Platform Commitment Date.** Initially, the "Platform Commitment" Date will be July 1, 2012. However, NetLibrary



may publish or announce a specific date as the Platform Commitment Date or a change in the practice of determining the Platform Commitment Date, provided that the publication or announcement will only be applicable to purchases of Audio Books licenses made after the date of the publication or announcement.

- c. **Migration.** If the Existing Platform becomes technologically obsolete and/or third party vendors cease to support third party components of the Existing Platform before the Platform Commitment Date; then, except as may be provided in this Agreement, NetLibrary will not charge Member any additional fees to support the Existing Platform until the Platform Commitment Date or to migrate Member's Audio Books content to a replacement platform before the Platform Commitment Date. If the Existing Platform becomes technologically obsolete and/or third party vendors cease to support third party components of the Existing Platform after the Platform Commitment Date, then NetLibrary may charge fees to support a replacement platform or to migrate Member's Audio Books to a replacement platform.

3. **Patron Access.**

Member will implement and maintain Limiting Access Measures, based on NetLibrary's standard systems, which will control Patrons' access to Member's NL Website.

4. **Reports.**

Payment of the Platform Fees entitles Member to the standard reports offered by NetLibrary. These reports may be modified by NetLibrary from time to time and may include without limit: current discount schedule, transaction history, owned Audio Books, popular Audio Books, Audio Books not owned, all Audio Books, new Audio Books, activity by subject area and activity by title. Nonstandard reports may be developed for a fee on a case-by-case basis.

D. **Member and Patron Usage.**

1. **Limiting Access Measures.** Member will be solely responsible for determining which Patrons will have access to Member's NL Website. Member and Consortium will be jointly responsible for determining which Patrons will have access to Consortium's NL Website, as applicable, under this Agreement. Member agrees to implement Limiting Access Measures within a reasonable time frame. NetLibrary, in its sole discretion, may discontinue Member's access to Member's NL Website and Consortium's NL Website, as applicable, if Member fails to implement Limiting Access Measures within a reasonable timeframe. Except for standard fees charged by Member to Patrons, Member will not charge any Patron for use of Member's NL Website.

2. **Terms of Use.** The use of Member's NL Website and Consortium's NL Website, as applicable, by Member and Patrons will be governed by the "Terms of Use" currently available at <http://www.netlibrary.com/TermsOfUse.aspx>, as they may be amended from time to time, which are incorporated in this Agreement by reference. If a Member or a Patron violates the Terms of Use, NetLibrary reserves the right, in its sole discretion,

to suspend or terminate Member's or the Patron's access to and use of Member's NL Website and Consortium's NL Website, as applicable. At its sole option, NetLibrary may notify Member of any violation by a Patron of the Terms of Use, and in the event, also at its sole option, NetLibrary may grant Member three days to attempt to correct the violation by a Patron and NetLibrary will not terminate the Patron's access to and use of Member's NL Website and Consortium's NL Website if the violation is corrected within the three day period. Member acknowledges and agrees that, in the case of repeated or persistent violations, NetLibrary may not provide the aforementioned notice and correction period to Member. Repeated or persistent violations of the Terms of Use by Member or Patrons may be cause for termination of this Agreement by NetLibrary.

3. **Tools.** Member will not use, implement or authorize use of any computerized or automated tool or application to search, index, test or otherwise obtain information from Member's NL Website and Consortium's NL Website, as applicable, including without limit any "spidering" or web crawler application (collectively, "Tools"), without obtaining the prior written approval of NetLibrary. NetLibrary will not unreasonably withhold this approval, provided that the proposed use of Tools does not (i) present a risk of interfering with use of NL Website by Patrons or other NetLibrary end-users; (ii) degrade or impair the performance of NL Website; (iii) cause NetLibrary to violate its agreements with its other end-users, its publishers or other third parties; or (iv) constitute a violation of applicable law, including without limit U.S. copyright law. Member acknowledges and agrees that NetLibrary may from time to time implement controls on Member's NL Website to regulate or restrict the use of Tools.

4. **Shared Collections.**

- a. **Shared Collection(s) Access.** NetLibrary will only permit access to and use of Consortium's Shared Collection(s) by a Consortium Member and the Member's Patrons if: (i) Consortium has executed a Consortium Agreement with NetLibrary, (ii) Consortium has given NetLibrary written notice that Consortium is willing to allow the Member to access a particular Shared Collection, and (iii) the Consortium Member has executed an Agreement. Until all of these conditions have been satisfied, NetLibrary will have no obligation to permit any Member of Consortium to access any Shared Collection of Consortium.

- b. **Shared Collection(s) Parameters.** At the time of purchase the Shared Collection closes. NetLibrary will provide access to a Consortium Shared Collection to a Consortium Member that Consortium has authorized to access the Consortium Shared Collection by giving NetLibrary written notice within 30 days after the Consortium Shared Collection closes. NetLibrary will not provide access to a Consortium Shared Collection to any Members that Consortium has not authorized to access the Shared Collection by giving NetLibrary written notice within 30 days after the Shared Collection closes.

## EXHIBIT B TO LIBRARY AGREEMENT FOR AUDIO BOOK PURCHASES -- GUIDELINES FOR THE USE AND TRANSFER OF OCLC-DERIVED RECORDS

Revision of November 16, 1987

## I. GUIDELINES

(See Definitions in Part II below)

1. Each member and nonmember library may use records without restriction, and may transfer records of its own holdings without restriction to other libraries.
2. In addition to transfers to libraries, each member and nonmember library may transfer records of its own holdings without restriction, to (a) member networks, (b) state and multi-state library agencies and (c) all other noncommercial firms.
  - a. Member networks may produce and transfer to any member library, copies on magnetic tape of records used or inserted into the OCLC database by the library. Each member network also may process records of the holdings of any member or nonmember library which has employed and agreed to pay it for that service, provided the member network has first signed either an individual agreement with the library, or a general agreement with OCLC, containing measures agreed upon by OCLC and the member network for protection of the records it has been employed to process. Any other use and transfer of records by member networks will be as provided in separate understandings with OCLC.
  - b. The use and transfer of records by library systems or projects operated by or under the aegis of one or more state or national library agencies will be as provided in separate understandings with OCLC. Such understandings may include (i) arrangements to incorporate state or national bibliographic databases into the OCLC system, (ii) paid-up licenses to use records in state or national programs (e.g., by means of payments for OCLC multi-institution tapes) and/or (iii) any other understandings that will facilitate state or national programs as well as the maintenance and enhancement of the OCLC database.
  - c. The use and transfer of records by any other organizations to which transfers are made under this Guideline 2 will be as provided in separate understandings with OCLC.
3. In addition, each member and nonmember library may transfer records of its own holdings to commercial firms which the library has employed and agreed to pay to process such records, provided that each commercial firm has first signed an individual agreement with the library, or OCLC has advised the library that the commercial firm has signed a general agreement with OCLC, in either case containing measures agreed upon by OCLC and the commercial firm for protection of the records it has been employed to process. In addition, each member and nonmember library may make any other transfers of records to commercial firms, subject to prior written agreements with OCLC. However, there is no requirement for prior written agreements (a) for transfers made under Guideline 1 above to libraries operated by commercial firms or (b) for transfers to commercial firms by former OCLC member libraries of records of their holdings, so long as the libraries maintain no continuing user status with OCLC.
4. When a nonmember organization makes bibliographic information available to OCLC which is subject to usage or transfer restrictions imposed by such nonmember organization, and OCLC nevertheless elects to accept the information for addition to the OCLC database, OCLC will notify libraries to which it makes the information available, and rights to use and transfer records based on such information will be subject to the same restrictions.
5. When transfers under Guideline 1 above are made to machine-readable union catalogs accessible by nonmember libraries, it is requested that machine-readable copies of the records of such union catalogs be submitted to OCLC. OCLC, at its own expense, will have the right to add such records to its database for all uses consistent with its chartered purposes.
6. The Guidelines above apply to all uses and transfers of records except where a mutually acceptable agreement establishing broader or narrower rights is made with OCLC relating to a specific product or service.

## II. DEFINITIONS

1. The term "member library" means a general member of OCLC as defined in its Code of Regulations.
2. The term "nonmember library" means any library other than a member library.
3. A "member network" is an OCLC-affiliated regional, state or multi-state library network organization which is in contract with OCLC to provide OCLC services and products, or to assist OCLC to provide such services and products, to general members of OCLC.
4. A "commercial firm" is any organization permitted, under applicable law, to operate on a for-profit basis.
5. The term "records" means bibliographic records and holdings data (including copies thereof) derived from the OCLC database, including derivative works made from such records, and either received in machine-readable form or converted by the transferee into machine-readable form. The term also includes such records when held only in eye-readable form, in the case of proposed transfers to commercial firms. However, records do not include, as to any member or nonmember library (a) bibliographic records designated in the OCLC database as original cataloging by such member or nonmember library and (b) bibliographic records derived by such member or nonmember library from sources other than the OCLC database and to copies of which in the OCLC database its holdings symbol has been attached by tapeloading. Such excluded records are freely transferable and are not dealt with in these Guidelines. OCLC-derived records held only in eye-readable form are freely transferable except to commercial firms.
6. The terms "transfer" and "transfer of records" refer to all sales, exchanges, gifts, sharing and other transfers, and all online access except online access provided to end-user patrons of a library in authorized possession of the records.



# **EXHIBIT 6**

Apr-20-07 02:43pm From:ADA (GDT PROCTER LLP

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T-183 P.01/04 F-880

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Goodwin Procter LLP  
Counselors at Law  
Exchange Place  
Boston, MA 02109  
T: 617.570.1000

**F A X T R A N S M I T T A L**

If problems with transmittal, call fax department at 617.570.1498.


Date	Total pages
April 20, 2007	4

To	Company	Fax number	Telephone
Rick Schwieterman	Nerl Library, Inc.	303-381-8600	
General Counsel	OCLC	303-381-8999	

From	Fax number	Telephone
R. David Hosp	617.523.1231	617.570.1089

Message:

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Apr-20-07 02:43pm From:ADA (GDT PROCTER LLP

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T-183 P.02/04 F-560

GOODWIN PROCTER

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April 20, 2007

**By Facsimile and Registered Mail**

Rick Schwieterman  
Vice President, Chief Financial Officer  
NetLibrary, Inc  
4888 Pearl East Circle, Suite 103  
Boulder, CO 80301

**Re: Termination of eContent Production and Distribution Agreement**

Dear Mr. Schwieterman:

This firm represents Recorded Books, LLC ("Recorded Books"). This letter is intended to notify you that Recorded Books is terminating its eContent Production and Distribution Agreement (the "Agreement") with netLibrary, a division of OCLC Online Computer Library Center, Inc. ("netLibrary"). This termination is both for cause under Section 4(b)(ii) of the Agreement, and also of right under Section 1(a) of Exhibit C to the Agreement.

NetLibrary has failed to satisfy its obligations under Sections 1(d)(i), (ii), (iii), and (v) of Exhibit B, as well as Section 3 (b) of Schedule B-1 to the Agreement. These failures, which both individually and in the aggregate constitute material breaches of the Agreement, include but are not limited to the following:

- NetLibrary has repeatedly failed to appropriately index and/or allow Recipients access to selected titles reliably or with reasonable stability. Complaints regarding these failures have been received from libraries in Thompson, CT; Scoville, CT; Seneca Falls, NY; Avon Lake, OH; the state of Wyoming; CLAMS Consortia, as well as from individual customers. Recorded Books first notified netLibrary of these deficiencies in November of 2006, but the causes of these failures have not been corrected, and complaints were still being received in March.
- NetLibrary has repeatedly failed to make MARC records—both initial batches and monthly updates—available to subscribers and recipients for downloading reliably or with reasonable stability in a timely fashion. Complaints have been received from libraries in Mohawk Valley, New York; Fulton County and Atlanta, GA; Capital Area, PA; Morris County New

Apr-20-07 02:43pm From:ADA (GDT PROCTER LLP)

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## GOODWIN PROCTER

Rick Schwieterman  
 April 20, 2007  
 Page 2

Jersey; Henderson, KY; Beamis, CO; Jackson County, IN; and CLAMS Consortia. Recorded Books notified netLibrary of these violations of the Agreement beginning in December of 2006, but netLibrary has failed to implement a system that achieves stable delivery, and complaints were still being received in April.

- NetLibrary has failed to implement a streamlined authentication process in connection with its netLibrary system in response to complaints from library subscribers. Moreover, in the course of attempting to address this issue, netLibrary caused a week-long shutdown of the netLibrary system in the Iowa City Public Library in January of 2007, that resulted in specific complaints of sub par customer support. The experience for the library has been onerous and word has spread throughout the state, damaging Recorded Books' business prospects in Iowa.
- NetLibrary has failed to address customer concerns and complaints regarding the size of the files transmitted by the netLibrary system, which results in inadequate bookmarking and failure of compatibility with otherwise suitable players. Recorded Books specifically notified netLibrary of the need to address this issue during meetings in March [April] of 2006, and conveyed the importance of the issue to subscribers at that time. NetLibrary has failed to correct the problem.
- NetLibrary has failed to implement a system that restricts a Checkout period for a recipient on a portable device to 21 days in violation of Sections 1(a)(1), 4(a)(1), and 4(b)(ii) of Exhibit B-1 of the Agreement. NetLibrary has been aware of this failure since the effective date of the Agreement, but has failed to address this breach.

These failures not only constitute material breaches of the Agreement, but they have resulted in ongoing customer complaints and subscriber dissatisfaction with the netLibrary system and have caused significant harm to Recorded Books. Recorded Books has repeatedly notified netLibrary of the problems its failures to live up to its obligations under the Agreement, but these notifications have gone largely unaddressed. As a result, Recorded Books hereby terminates the Agreement for cause under Section 4(b)(ii).

Recorded Books also hereby terminates the Agreement in accordance with Section 1(a) of Exhibit C, as is its right in light of netLibrary's decision to forego the exclusivity provisions of that exhibit.

Recorded Books will honor its post-termination obligations under the Agreement, including continuing to provide content for those netLibrary subscriptions now in effect. Recorded Books will notify its sales representatives and customers, however, that it will no longer be offering



Apr-20-07 02:44pm From:ADA (GDT PROCTER LLP

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Rick Schwieterman

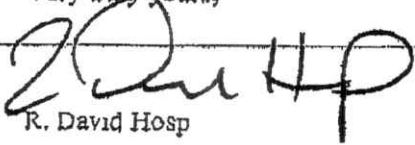
April 20, 2007

Page 3

new subscriptions to the netLibrary product effective immediately, nor will we seek or honor renewals of present contracts. Recorded Books expects that NetLibrary will not enter into any new agreements with customers that call for Recorded Books' content.

Thank you for your attention to this matter.

Very truly yours,

A handwritten signature in dark ink, appearing to read "R. David Hosp", is written over a horizontal line.

R. David Hosp

cc: Brian Downing, Recorded Books, LLC  
General Counsel, OCLC Online Computer Library Center, Inc

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